90-1501

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

OLIVER L. NORTH,
Cross-Petitioner,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an instruction directing a verdict on an essential element of an offense can be harmless error?

2. Whether it was error (a) to instruct the jury that the word "corruptly" in 18 U.S.C. § 1505 means only the intent to obstruct an inquiry or proceeding, and (b) to preclude the jury from considering evidence that the defendant believed his conduct was lawfully authorized by his superiors unless it found that he reasonably believed that the authorization was legally proper?

3. Whether the court of appeals erred (a) in applying the harmless error standard for nonconstitutional error to an order compelling the defendant to disclose before trial a 162-page summary of anticipated classified defense testimony without requiring reciprocal disclosure by the government, (b) in considering only the harm to the defendant from the government's undisclosed rebuttal evidence, while ignoring the harm to the defendant from the disclosure of anticipated defense testimony, and (c) in placing the burden of proving harm from the nonreciprocal disclosure on the defendant?

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Oliver L. North cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. As set forth in North's opposition to the independent counsel's petition for a writ of certiorari, the judgment of the court of appeals is interlocutory and this Court should therefore deny the independent counsel's petition. *See* Brief in Opposition to Petition for a Writ of Certiorari (filed March 27, 1991). The issues presented in the petition (and in this cross-petition) are appropriately reviewed by this Court, if ever, only after the district court has conducted the *Kastigar* hearing ordered by the court of appeals and determined the extent to which North's immunized testimony was used, directly or indirectly, in the grand jury and at trial. The proceedings ordered by the court of appeals may also moot the questions presented in the petition and in this cross-petition.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-218a) is reported at 910 F.2d 843.[1] The opinion of the court of appeals on rehearing (App. 219a-260a) is reported at 920 F.2d 940. The pertinent opinions of the district court are reported at 698 F. Supp. 316 (Classified Information Procedures Act) (Cross-App. 1a-13a); 708 F. Supp. 399 (Classified Information Procedures Act) (Cross-App. 14a-20a); and 716 F. Supp. 644 (authorization and intent for Count 6) (App. 302a-313a).

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[1] The appendix that accompanies the independent counsel's petition for a writ of certiorari will be cited as "App."; the appendix filed herewith will be cited as "Cross-App."; and the joint appendix filed in the court of appeals will be cited as "JA."

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1990, and a timely petition for rehearing was denied on November 27, 1990. Cross-petitioner relies on Sup. Ct. R. 12.3. The independent counsel's petition for a writ of certiorari was received on February 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are the Fifth Amendment to the United States Constitution (Cross-App. 21a); 18 U.S.C. § 1505 (Cross-App. 22a); 18 U.S.C. App. IV (Cross-App. 23a); 28 U.S.C. § 2111 (Cross-App. 33a); and Fed. R. Crim. P. 52(a) (Cross-App. 34a).

STATEMENT OF THE CASE

A. Proceedings Below

Oliver North was indicted on March 16, 1988, together with Admiral John Poindexter, Major General Richard Secord (USAF Ret.), and Albert Hakim.[2] The indictment contained 23 counts; 16 named North as a defendant. On June 8, 1988, the district court granted defendants' motions for severance and ordered four separate trials. The independent counsel ("IC") elected to try North first. Following dismissal of four counts, trial began on February 21, 1989. The jury retired for its deliberations on April 20, 1989. On May 4, after twelve days of deliberations, the jury returned verdicts of not guilty on nine counts and guilty on three counts: aiding and abetting an endeavor to obstruct Congress under 18 U.S.C. §§ 1505 and 2 (Count 6); destroying, altering, or removing official NSC documents under 18

[2] The jurisdiction of the district court was founded on 18 U.S.C. § 3231.

U.S.C. § 2071(b) (Count 9); and accepting an illegal gratuity, consisting of a security system for North's home, under 18 U.S.C. § 201(c)(1)(B) (Count 10).[3]

The court of appeals vacated North's three convictions because the district court had failed to comply with the requirements of *Kastigar* v. *United States*, 406 U.S. 441 (1972), and it remanded for a hearing into the use of North's immunized testimony against him in the grand jury and at trial. App. 3a, 44a-45a. In addition, the court of appeals reversed North's conviction on Count 9 because the district court's instructions had improperly restricted the jury's consideration of evidence of authorization relevant to North's intent and had permitted conviction by a nonunanimous jury. App. 3a-4a, 45a-56a, 68a-76a. Chief Judge Wald dissented from each of these rulings. App. 126a-163a.

The court of appeals rejected North's remaining arguments for reversal. Of significance here, the court (1) dismissed as harmless error the district court's directed verdict on an element of the offense charged in Count 6, App. 83a-88a; (2) approved the district court's instruction on the corrupt intent element of 18 U.S.C. § 1505, the statute at issue in Count 6, and its instruction that the jury could consider evidence of authorization as relevant to North's intent on Count 6 only if North "reasonably believed the order was legally proper," App. 61a-68a; and (3) applied the standard for nonconstitutional error and placed the burden of proving harm on North, finding harmless the district court's order compelling North to disclose before trial a 162-page summary of anticipated classified defense testimony, without requiring reciprocal disclosure by the IC, App. 95a-105a.[4]

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[3] North was sentenced to a three-year suspended term of imprisonment, placed on probation for two years conditioned on performance of 1200 hours of community service, and fined $150,000. He has completed his 1200 hours of community service.

[4] The court of appeals found three additional errors harmless. First, the court found that the district court's order quashing

Judge Silberman dissented from each of these rulings. First, he noted the uniform rule that "reversal is automatically required when the judge, as here, directs a verdict on an essential element of a crime." App. 209a. Second, he declared that the majority's construction of the intent requirement in 18 U.S.C. § 1505 improperly "renders the word 'corruptly' meaningless," App. 191a, and he also rejected the district court's objective reasonableness limitation on the jury's consideration of evidence of authorization, App. 190a. Third, he concluded that the district court's order compelling North to disclose anticipated classified defense testimony before trial, without requiring reciprocal disclosure, violated North's right to due process of law, as recognized in *Wardius* v. *Oregon*, 412 U.S. 470 (1973). Applying the harmless error standard applicable to *constitutional* error, and considering the full range of harm to North, Judge Silberman concluded that "the prejudicial effect of the error committed here is clear." App. 172a.

The IC filed a petition for rehearing with a suggestion for rehearing en banc. The panel withdrew the portion of its prior opinion concerning the absence of a specific unanimity instruction, but it denied the IC's petition in all other respects. Chief Judge Wald again dissented. App. 219a-255a. The court of appeals declined to re-

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North's subpoena to former President Reagan "amounted to at worst harmless error." App. 83a & n.25. Second, although the court found two portions of the IC's closing argument to be "clearly improper," it concluded that "neither was sufficiently prejudicial to North as to warrant the reversal of any or all of his convictions." App. 88a. Third, the court intimated that the district court's special verdict form, requiring a total of 19 not-guilty verdicts to acquit on the 12 counts, was improper, but it declined to reverse North's convictions on that ground. App. 119a-121a.

Despite finding a range of errors, the panel majority failed to discuss whether the errors, even if individually harmless, were in combination sufficiently prejudicial to require reversal. *See, e.g.*, *United States* v. *Pearson*, 746 F.2d 787, 796 (11th Cir. 1984); *United States* v. *Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978).

hear the case en banc, with Chief Judge Wald dissenting alone with respect to the *Kastigar* issues and dissenting with Judge Ruth B. Ginsburg with respect to the issue of authorization and intent on Count 9. App. 256a-259a.

On February 25, 1991, the IC petitioned this Court for a writ of certiorari. The IC's petition challenges only the court of appeals' rulings on North's immunized testimony; it does not seek review of the court's reversal of North's conviction on Count 9.

B. The Charges Remaining Against North

Following North's acquittal on nine counts and the court of appeals' reversal of North's conviction on Count 9, two counts remain at issue: Count 6, which alleges that North aided and abetted an endeavor to obstruct Congress in violation of 18 U.S.C. §§ 1505 and 2, and Count 10, which alleges that North accepted an illegal gratuity in violation of 18 U.S.C. § 201(c)(1)(B).

1. Count 6.—Count 6 charged that in November 1986 North endeavored to obstruct congressional inquiries into the sale of arms to Iran and into United States government support for the Contras by (a) preparing an internal Executive Branch chronology of the Iran initiative that, in its latest draft, denied any U.S. involvement in the November 1985 shipment of HAWK missiles from Israel to Iran; and (b) altering, destroying, concealing, and removing NSC and NSC staff documents. North was found not guilty as a principal, but guilty under 18 U.S.C. § 2. JA 691.

The first allegation concerned a chronology of the Iran initiative that National Security Advisor Poindexter directed North to develop in early November 1986, after the initiative was first publicly disclosed. JA 251-52, 1532, 1664. In mid-November 1986, two congressional committees announced that they wanted Poindexter and Director of Central Intelligence William Casey to appear

before the committees on November 21, 1986. Count 6 charged that North, "in preparation for" their appearances, endeavored to obstruct the committees by participating in the preparation of the chronology.

At the time he drafted the chronology, North understood that the President and his top advisors had decided that U.S. involvement in the 1985 HAWK shipment should not be disclosed. JA 1536-46, 1552, 1668, 1671-73.[5] To protect continuing negotiations with Iran concerning the release of U.S. hostages, the President and Poindexter both had denied any such role in public statements and in briefings to Congress. JA 1057-60, 1550-51, 1557, 1666, 2736, 2983, 2985, 3582. Similarly, Robert McFarlane—who had directed North to assist with the 1985 HAWK shipment—denied knowledge of it in November 1986, and actually sat down at North's PROFs machine and deleted the shipment from a draft of the chronology. JA 1072, 1536-38, 1667-68, 1672.

Count 6 also charged that between November 21, 1986 and November 25, 1986, North and others altered, destroyed, concealed, and removed NSC and NSC staff documents concerning the Iran initiative and support for the Contras. JA 252-53. In response to North's pretrial request for particulars, the IC limited the allegations of alteration to five specific documents relating solely to Contra support.[6] North testified that he had destroyed

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[5] The involvement of the U.S. in the November 1985 HAWK shipment was one of the most sensitive aspects of the Iran initiative. The Iranians were angered because the missiles had Israeli markings and did not perform as the Iranians had expected. JA 1486-87. To prevent the Iranians from blaming the U.S. for the faulty missiles (with the accompanying danger to the American hostages), North and others consistently denied in negotiations with the Iranians that the U.S. had had any role in the November 1985 HAWK shipment. JA 1533-34, 1668.

[6] *See* Letter from Associate IC Zornow to defense counsel, at 6, Aug. 10, 1988 (attached as Exhibit A to Motion for a Bill of Particulars (Defendant's Pretrial Motion Number 52) (filed Oct. 11, 1988)).

and altered documents believing that his conduct was lawful and authorized by his superiors. JA 1456-62, 1558-59, 1579-83, 1625-36. He also testified that his removal of copies of documents from the NSC on November 25, 1986 was based on the advice of prior counsel, that his purpose was to preserve documents demonstrating that his superiors knew about and authorized his conduct in connection with the two covert operations, and that he returned all of the documents on December 2, 1986, after retaining his present counsel. JA 1562-70, 2768, 2892.

2. Count 10.—Count 10 involved a security system installed at North's home following a threat on his life by the terrorist Abu Nidal. It alleged that North accepted the system "for and because of" official acts performed or to be performed on behalf of Secord. JA 262. North testified that he accepted the security system because he was concerned for the safety of his family, that he did not accept it for or because of any official act, and that he did not view it as compensation for official acts. JA 1510.

REASONS FOR GRANTING THE WRIT

I. THE MAJORITY'S HOLDING THAT THE DISTRICT COURT'S PARTIAL DIRECTED VERDICT ON COUNT 6 WAS HARMLESS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The court of appeals held that a directed verdict on an essential element of an offense can constitute harmless error. That holding conflicts directly with at least two decisions of this Court and decisions by at least four other courts of appeals.

The statute at issue in Count 6—18 U.S.C. § 1505—requires proof that a congressional "inquiry or investigation [was] being had." Whether such an inquiry was

"being had" is a question for the jury; both the IC and North submitted proposed jury instructions dealing with this element of the offense. App. 84a; JA 2434, 2468-70. Nevertheless, the district court instructed the jury "as a matter of law" that "inquiries were pending" and told the jury that "[y]ou need only deliberate regarding the other three elements." App. 84a; JA 545-46.

The panel majority acknowledged that the district court's directed verdict on an essential element of the offense was error, but it held that the error was harmless. App. 84a-88a. The majority explained:

> Since the jury had to find all of the *other* elements of a violation of 18 U.S.C. § 1505—whether North knew of the pending inquiries, whether he endeavored to obstruct them, and whether he did so with requisite criminal intent, *see* JA at 635—the instruction imposed no conclusive presumption of guilt . . . and left the jury, rather than the judge, as the ultimate arbiter of whether North violated 18 U.S.C. § 1505 . . . .

App. 85a (emphasis added) (citations omitted). Because the jury was required to find *three* elements of the offense, the court of appeals excused the district judge's directed verdict on the *fourth* element.[7]

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[7] The panel majority believed that North had admitted in his trial testimony "that congressional inquiries were in fact pending in November 1986." App. 86a. But Count 6 charged that North aided and abetted an endeavor to obstruct *two* congressional inquiries, one into arms sales to Iran and the other into efforts by the United States government to aid the Contras. JA 251-53. North's testimony concerned only his knowledge of the Iran inquiry; as Judge Silberman noted, there is a serious question whether an inquiry was pending into Contra support in November 1986, when the so-called Contra support documents were allegedly altered. App. 215a-217a. The jury's verdict on Count 6 does not disclose whether it found that North aided and abetted an endeavor to obstruct an *Iran* inquiry, a *Contra support* inquiry, or both. Because North's conviction on Count 6 could have rested solely on the charged obstruction of an alleged Contra support inquiry, the conviction must be reversed. *See, e.g.*,

The panel majority's holding is directly contrary to this Court's decision in *Rose* v. *Clark*, 478 U.S. 570 (1986). In *Rose*, the Court made clear that harmless error analysis does not apply to certain errors—including "'entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction.'" *Id.* at 578 (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)); *see also Connecticut* v. *Johnson*, 460 U.S. 73, 84, 87-88 (1983) (plurality opinion) (conclusive presumption, like a directed verdict, "deprived respondent of constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error") (quotation omitted); *id.* at 95-97 (Powell, J., joined by Burger, C.J., Rehnquist & O'Connor, JJ., dissenting) (plurality incorrectly equated conclusive presumption, which should be subject to harmless error analysis, with directed verdict, which cannot be harmless).[8]

Cramer v. *United States*, 325 U.S. 1, 36 n.45 (1945); *Stromberg* v. *California*, 283 U.S. 359, 368 (1931).

Inexplicably, the panel majority suggested that the issue whether an inquiry was pending into Contra support was a "'Johnny-come-lately,' for North himself made no mention of the subject of the investigation in his proposed jury instructions." App. 88a n.30. In fact, North objected to the district court's instruction precisely as Fed. R. Crim. P. 30 contemplates. As Judge Silberman recognized, "[w]hen North objected to this particular instruction his counsel said, 'We object to the finding as a matter of law and particularly because we believe there's no evidence that there was a Contra investigation underway in November 1986.' (Tr. 8499; J.A. 1830). He could hardly have been clearer." App. 216a.

[8] In *Arizona* v. *Fulminante*, No. 89-839 (U.S. March 26, 1991), this Court declared that "structural defects in the constitution of the trial mechanism . . . defy analysis by 'harmless-error' standards," while "trial error" *can* be subjected to harmless error analysis. Slip op. at 8. A directed verdict on an essential element of the offense is plainly a "structural defect," since in that case "the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578; *see Carella* v. *California*, 109 S. Ct. 2419, 2422 (1989) (Scalia, J., joined

Contrary to the panel majority's conclusion, App. 85a, *Rose* did not reject harmless error analysis solely with respect to cases in which the trial judge directs an ultimate verdict of guilty; the distinction the Court drew was between (1) instructions that shift the burden of proof (which are subject to harmless error analysis), and (2) instructions that preclude the jury from considering an element of the offense (which are not subject to harmless error analysis). The Court stated: " 'Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering *an issue*.' " *Rose*, 478 U.S. at 580 n.8 (emphasis added) (quoting *Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting)). The instruction at issue here prevented the jury from considering "an issue"—whether an inquiry was "being had"—and it therefore cannot be harmless.[9]

With the exception of the court of appeals in this case, the federal appellate courts to consider the issue have concluded that a directed verdict on an element of an offense cannot be harmless. As the Eleventh Circuit

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by Brennan, Marshall & Blackmun, JJ., concurring) (declaring that right to a jury trial violated by directed verdict for the government "is a structural guarantee"). The dissenting Justices in *Fulminante* reaffirmed that "a judge in a criminal trial is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." Slip op. at 13 (dissenting op. of White, Marshall, Blackmun & Stevens, JJ.) (quotation omitted).

[9] As Judge Silberman observed,

> [T]he Court applied the harmless error analysis in *Rose* since, "the jury . . . found . . . every fact necessary to establish every element of the offense beyond a reasonable doubt." [*Rose*, 478 U.S.] at 581 (internal quotes omitted). That is not true here, where the trial court instructed the jury that one element of the offense has been established as a matter of law.

App. 210a-211a.

declared, "a trial court's actions in directing a verdict in a criminal trial, either in whole or in part, cannot be viewed as harmless error." *United States* v. *Goetz*, 746 F.2d 705, 709 (11th Cir. 1984); *see, e.g., United States* v. *Dunkel*, No. 89-1841, 1991 U.S. App. LEXIS 3599, *4 (7th Cir. March 8, 1991) (because an instructional error "removed from the jury's purview one of the elements of the offense . . . [i]t follows that the error cannot be harmless"); *United States* v. *Mentz*, 840 F.2d 315, 324 (6th Cir. 1988) (district court's directed verdict on an element of the offense "cannot be deemed harmless"); *United States* v. *Kerley*, 838 F.2d 932, 937 (7th Cir. 1988) ("[T]he harmless-error doctrine . . . does not apply when the judge directs a partial verdict against the defendant by telling the jury that one element of the crime . . . has been proved beyond a reasonable doubt . . . ."); *United States* v. *White Horse*, 807 F.2d 1426, 1429 (8th Cir. 1986) (when trial court directs verdict on essential element, "[i]t makes no difference that the evidence supporting proof of that element is overwhelming, for it is the jury's role, not the judge's, to find the facts essential to a criminal conviction") (quotation and citation omitted).

The panel majority believed that it could disregard these cases because, in its view, this Court had established a new harmless error regime in *Carella* v. *California*, 109 S. Ct. 2419 (1989). App. 85a-87a & n.28.[10]

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[10] The panel majority also attempted to distinguish decisions by other courts of appeals on the ground that "[i]n none of these cases . . . was the undisputed fact found by the trial judge a logical prerequisite for the jury's finding of the other elements of the crime . . . ." App. 87a n.28. This attempted distinction is without merit for three reasons. First, the "fact found by the trial judge" in this case—that inquiries were pending—was not undisputed. *See supra* note 7. Second, whether the fact found by the district court was a "logical prerequisite" for the jury's other findings is irrelevant; the crucial point is that the district court's instruction *precluded* the jury from determining whether an inquiry was "being had." Thus, the court's erroneous instruction "prevent[ed the] jury from con-

Carella involved a presumption; it did not involve a directed verdict on an element of the offense. As Judge Silberman declared, "the Majority simply ignores the distinction between the error of shifting the burden of proof at issue in *Carella* and the blatant directed verdict at issue here." App. 212a.

Both the majority in *Carella* and the four-Justice concurrence were careful to distinguish the presumption at issue there from a directed verdict. The majority took pains to note that in *Rose* the Court had expressly distinguished a burden-shifting presumption from a directed verdict. *See Carella*, 109 S. Ct. at 2421. Justice Scalia's concurrence, joined by Justices Brennan, Marshall, and Blackmun, declared that "[a] defendant may assuredly insist upon observance of [the right to trial by jury] even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State." *Id.* at 2422. In a passage that directly undercuts the panel majority's reading of *Carella*, the four Justices declared:

> These principles necessarily circumscribe the availability of harmless-error analysis when a jury has been instructed to apply a conclusive presumption.

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sidering an issue," and that instruction therefore cannot be harmless. *Rose*, 478 U.S. at 580 n.8 (quotation omitted).

Third, other courts of appeals have expressly rejected the panel majority's apparent position that a directed verdict on one element of an offense can be cured by the jury's finding on a related element. *See, e.g., United States* v. *Johnson*, 718 F.2d 1317, 1323 (5th Cir. 1983) (en banc) (district court instructed jury as a matter of law that "Gold Certificate" was a security; in reversing conviction, court of appeals rejects contention that submission of the issue of defendant's knowledge cured the error); *United States* v. *Singleton*, 532 F.2d 199, 206-07 (2d Cir. 1976) (submission of issue whether defendant knew checks were stolen did not cure court's comment that "it was 'clear' that the checks were recently stolen"; plain error to take from jury issue whether checks in fact were stolen).

> If the judge in the present case had instructed the jury, "You are to apply a conclusive presumption that Carella embezzled the rental car if you find that he has blue eyes and lives in the United States," it would not matter, for purposes of assuring Carella his jury-trial right, whether the record contained overwhelming evidence that he in fact embezzled the car. For nothing in the instruction would have directed the jury, or even permitted it, to consider and apply that evidence in reaching its verdict. And the problem would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. *As with a directed verdict, "the error in such a case is that the wrong entity judged the defendant guilty."*

Id. (quoting *Rose*, 478 U.S. at 578) (emphasis added); *see Dunkel, supra*, 1991 U.S. App. LEXIS 3599, *4 (citing *Carella* concurrence for proposition that taking an element of an offense from the jury cannot be harmless). In light of the quoted language from the majority and concurring opinions in *Carella*, there is no basis for the panel majority's interpretation of the case. Although *Carella*, *Rose*, and *Johnson* reflect disagreement among the Justices over the application of harmless error analysis to presumptions, no Justice in any of those cases questioned the principle that a directed verdict on an essential element of an offense cannot be harmless.

The panel majority's holding that harmless error analysis could be applied to a partial directed verdict conflicts with this Court's rulings in *Rose* and *Carella* and with the decisions of the other courts of appeals to address the question. If the Court grants the IC's petition, it should grant the cross-petition as well.

II. THE MAJORITY'S HOLDING ON INTENT AND AUTHORIZATION UNDER 18 U.S.C. § 1505 CONFLICTS WITH THIS COURT'S DECISIONS IN *CHEEK* v. *UNITED STATES* AND *LIPAROTA* v. *UNITED STATES*

North contended in part on Count 6 that he did not act "corruptly," as 18 U.S.C. § 1505 requires, because he believed that his conduct was lawfully authorized by his superiors, including President Reagan, National Security Advisor Poindexter, and Director of Central Intelligence Casey. The district court undermined this defense through two critical instructions. First, it rejected North's requested instruction requiring proof of knowledge of illegality under § 1505. Instead, the court instructed the jury on the "corruptly" element that North must have had "the bad purpose to act in the precise manner the statute was intended to prevent. That is, to obstruct or to try to obstruct an inquiry or proceeding." JA 574. Second, the court instructed the jury that it could consider evidence of authorization as relevant to North's intent only if North "*reasonably* believed the order was legally proper." JA 573 (emphasis added).[11]

The court of appeals' decision approving these instructions conflicts with *Cheek* v. *United States*, 111 S. Ct. 604

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[11] The district court further instructed the jury that authorization was relevant to intent *only* if "no alternative was available to [North] to comply with [his] orders by other lawful means." It prohibited the jury from considering evidence of authorization if North had a lawful alternative: "[I]f an authorization can be satisfied by two different courses of action, one clearly legal and one illegal *or of dubious legality* and a person chooses the illegal or dubious course when other legal action would comply, *authorization cannot be viewed as affecting intent.*" JA 572-73 (emphasis added). As Judge Silberman observed, under this "most damaging instruction . . . it is not even necessary for the defendant to be aware that the clearly legal course of action was available to him." App. 190a. These instructions (especially when read in conjunction with the instruction requiring that North "reasonably believe[]" in the legality of his authorization) constitute error.

(1991), and *Liparota* v. *United States*, 471 U.S. 419 (1985). These decisions make clear that specific intent for serious federal offenses that embrace some apparently innocent conduct requires proof of subjective knowledge of wrongfulness or illegality. The panel majority's holding undermines the fundamental principle that a person must have notice that his conduct is wrongful before he can be subjected to serious punishment for his acts.

A. Under *Cheek* and *Liparota*, Serious Federal Offenses That Penalize a Range of Apparently Innocent Conduct Require Subjective Knowledge of Wrongfulness or Illegality

In *Cheek*, involving tax offenses, the district court instructed the jury that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness," and it precluded the jury from considering evidence of Cheek's objectively unreasonable belief that his actions were lawful. 111 S. Ct. at 608 (quoting district court instruction). This Court vacated Cheek's convictions. It noted that for purposes of tax offenses, "[w]illfulness . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 610. Accordingly, the government must prove that the defendant was *actually aware* of the legal duty at issue, "which cannot be true if the jury credits a good-faith misunderstanding and belief submission, *whether or not the claimed belief or misunderstanding is objectively reasonable.*" *Id.* at 611 (emphasis added).

Because this Court found that willfulness must be determined by a subjective rather than an objective standard, it held that the jury should have been permitted to consider evidence supporting Cheek's claim that he lacked awareness of the asserted legal duty, even if such a lack of awareness was objectively unreasonable. "[I]t is not contrary to common sense, let alone impossible, for a de-

fendant to be ignorant of his duty based on an irrational belief that he has no duty, *and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision.*" *Id.* (emphasis added). Accordingly, "[i]t was . . . error to instruct the jury to disregard evidence of Cheek's understanding [of the tax laws], as incredible as such misunderstandings of and beliefs about the law might be." *Id.*

Although *Cheek* is a tax case, its basic principle—that to prove specific intent the government must establish that the defendant had actual knowledge that he was violating a legal duty—applies to other federal offenses that penalize a range of apparently innocent conduct. In *Liparota*, for example, this Court declared that under 7 U.S.C. § 2024(b)(1), the food stamp fraud statute, "the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations." 471 U.S. at 433. The Court found this construction of the statute "particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* at 426.[12]

Cheek and *Liparota* rest upon the requirement that a person have notice that his conduct is wrongful before he is punished for violating the law. It is fundamental that "a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie* v. *City of Columbia*, 378 U.S. 347, 350 (1964). If a statute penalizes conduct that does not otherwise appear wrongful, then a requirement of

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[12] The courts of appeals have similarly required proof of subjective knowledge of illegality or wrongfulness for federal statutes that provide serious penalties for some apparently innocent conduct. *See, e.g., United States* v. *Rhone*, 864 F.2d 832, 835-37 (D.C. Cir. 1989) (mail fraud and theft charges require proof of subjective knowledge of illegality); *United States* v. *Golitschek*, 808 F.2d 195, 202-03 (2d Cir. 1986) (charges of conspiracy and wire fraud arising out of arms exports "require[] knowledge of a legal obligation").

subjective knowledge of wrongfulness or illegality ensures that only those with notice that their conduct is proscribed will be punished. *See, e.g., United States* v. *Reeves*, 752 F.2d 995, 999-1000 (5th Cir.) (construing term "corruptly" in 26 U.S.C. § 7212(a) "to specifically insure that potential violators will be on notice of what constitutes corrupt behavior under section 7212(a)"), *cert. denied*, 474 U.S. 834 (1985).

In *Cheek*, for example, this Court rested its interpretation of the term "willfully" on the fact that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." 111 S. Ct. at 609. Similarly, in *Liparota* this Court observed that

> [a] strict reading of the statute with no knowledge-of-illegality requirement would . . . render criminal a food stamp recipient who, for example, used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants. Such a reading would also render criminal a nonrecipient of food stamps who "possessed" stamps because he was mistakenly sent them through the mail due to administrative error, "altered" them by tearing them up, and "transferred" them by throwing them away.

471 U.S. at 426-27. The *Liparota* Court applied the "rule of lenity," which mandates that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," because application of the rule "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Id.* at 427. *Cheek* and *Liparota* underscore the principle that, where possible, criminal statutes should be construed to require knowledge of wrongfulness or illegality when necessary to en-

sure that potential violators have notice that their conduct is prohibited.

B. The Panel Majority's Holding on Intent and Authorization Under 18 U.S.C. § 1505 Conflicts with the Requirement of Fair Notice Recognized in *Cheek* and *Liparota*

The panel majority's decision conflicts with *Cheek* and *Liparota*. The district court's instruction on the term "corruptly" in § 1505, and its objective reasonableness limitation on evidence of authorization as relevant to intent, violated the principle recognized in those cases that federal statutes which penalize some apparently innocent conduct should be construed to require proof of subjective knowledge of wrongfulness or illegality.

The panel majority initially appeared to acknowledge that the district court's construction of the "corruptly" element would subject some persons to punishment without notice that their conduct was wrongful. The majority noted that in interpreting the word "corruptly" in 18 U.S.C. § 1505 and in 18 U.S.C. § 1503 (prohibiting obstructions of judicial proceedings) some courts "have said that the word 'corruptly' means nothing more than an intent to obstruct the proceeding." App. 63a. The majority initially rejected this interpretation of "corruptly" in § 1505, because "to assert that all endeavors to influence, obstruct or impede the proceedings of congressional committees are, as a matter of law, corrupt . . . *would undoubtedly criminalize some innocent behavior.*" App. 64a (emphasis added).[13] The majority acknowledged

[13] The majority distinguished § 1505 from 18 U.S.C. § 1503, which prohibits corrupt endeavors to obstruct judicial proceedings. Because "very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap immediately to mind," the panel majority concluded that a presumption that an endeavor to obstruct a judicial proceeding is corrupt "may well be warranted." App. 63a. But the majority initially declined to "import that legal presumption to section 1505," because to do so would criminalize some innocent behavior. App. 64a.

that "[n]o one can seriously question that people constantly attempt, in innumerable ways, to obstruct or impede congressional committees," and it posited the examples of an executive branch official asking a committee chairman to call off an investigation designed to embarrass the President and a political activist informing his representative that he would oppose her reelection unless she stopped pursuing a particular investigation. App. 64a. The dissent offered additional examples of lawful endeavors to impede congressional inquiries. App. 182a.

But after concluding that § 1505 would criminalize some apparently innocent conduct if the "corruptly" element required only the intent to obstruct an inquiry, as the district court instructed the jury, the panel majority did an about-face and approved that very instruction. Although the majority stated that the word "corruptly" in § 1505 "[is] to be understood according to [its] common meaning[]," App. 68a, it ultimately disregarded that meaning. According to the majority, one "common meaning" of a corrupt intent is " 'the intent to obtain an *improper* advantage for [one]self or someone else, inconsistent with official duty and the rights of others.' " App. 63a (quoting *Ballentine's Law Dictionary* 276 (3d ed. 1969)) (emphasis added).[14] That is a far cry from the district court's instruction, approved by the majority, that "corruptly" means with "the bad purpose . . . to obstruct or to try to obstruct an inquiry or proceeding." JA 574.[15]

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[14] Similarly, the Second Circuit recently declared that the word "corruptly" is "ordinarily understood as referring to acts done voluntarily and intentionally and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful means." *United States* v. *McElroy*, 910 F.2d 1016, 1021 (2d Cir. 1990) (quotation omitted) (construing 18 U.S.C. § 215(a)).

[15] On the basis of its erroneous construction of § 1505, the panel majority also approved the district court's objective reasonableness limitation on evidence of authorization. The panel declared that "[b]ecause the District Court had correctly defined for the jury the

In fact, as the majority's analysis (but not its result) demonstrates, "when a defendant is accused under section 1505 of corruptly endeavoring to obstruct a congressional committee, the word 'corruptly' in the statute requires the prosecution to show something beyond a mere intent to obstruct the committee." App. 184a. The requirement that the government prove "something beyond" a mere intent to obstruct is essential to ensure that potential violators of § 1505 have notice that their conduct is prohibited.[16] Absent such an intent requirement, § 1505 would "criminalize a broad range of apparently innocent conduct," including the lawful endeavors to obstruct congressional inquiries posited by the panel majority and the dissent. *Liparota*, 471 U.S. at 426; *cf. Reeves*, 752 F.2d at 1001-02 (26 U.S.C. § 7212(a), forbidding "corrupt[]" endeavors to obstruct or impede administration of the tax laws, requires proof that the defendant intended "to secure an unlawful advantage or benefit" to himself or others, to ensure that potential violators know whether their conduct is prohibited).[17]

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required intent, and because 'corruptly' and the other words in the statute are to be understood according to their common meanings, necessitating no specific definitional instructions from the court, we see no way in which the evidence of authorization would bear on the decisions the jury was required to make." App. 68a.

[16] Even under 18 U.S.C. § 1503, which covers little or no apparently innocent conduct, App. 63a-64a, the government must "establish that the conduct was prompted, at least in part, by a corrupt motive." *United States* v. *Thomas*, 916 F.2d 647, 651 (11th Cir. 1990) (quotation omitted).

[17] Indeed, the conclusion in *Cheek* and *Liparota* applies with particular force here. The conduct at issue in those cases—blatant tax violations in *Cheek* and food stamp fraud in *Liparota*—was clearly unlawful. By contrast, the destruction, alteration, and removal of documents at issue at Count 6 was *not* unlawful in itself; "[g]overnment officials, particularly those who deal with security matters, often shred documents as a matter of course—to do otherwise might create serious dangers or, in some circumstances, violate the law." App. 189a.

The determination whether North's intent was "corrupt[]"—like the determination in *Cheek* and *Liparota* whether the defendants in those cases acted with specific intent—should have focused on North's *subjective* knowledge of illegality. *Cheek* and *Liparota* make clear that the district court should have instructed the jury that Count 6 required proof that North knew his conduct was unlawful, and the court should have permitted the jury to consider *all* evidence of authorization in determining North's intent, whether or not North's belief that his conduct was lawfully authorized was reasonable.[18]

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[18] The panel majority's erroneous construction of the term "corruptly" in 18 U.S.C. § 1505 led to a further error. The majority concluded that the district court properly quashed North's subpoena to former President Reagan, reasoning that § 1505 does not require proof of knowledge of illegality, and that evidence of authorization —including the testimony that North proffered from former President Reagan—was therefore irrelevant to North's intent. App. 78a-80a. But under a proper construction of the term "corruptly," the proffered testimony from Mr. Reagan was directly relevant to North's belief that his conduct was authorized. Judge Silberman succinctly described the impact of the district court's order quashing North's subpoena to Mr. Reagan:

> North worked in the White House, only one step removed from the President himself, with what appears to have been enormous responsibility. He has been convicted of violating criminal statutes (never before employed as here) and his defense is that he was *lawfully* doing the President's bidding, and doing so with regard to a substantive area of national security policy, which, whatever one's view of those policies, would have been thought at the core of the Chief Executive's constitutional responsibility. His immediate superior, Admiral Poindexter, was unavailable as a defense witness. Under these circumstances, for the trial judge to have refused to compel Reagan's testimony, was to deprive North of a fair trial.

App. 207a-208a (emphasis in original).

III. THE MAJORITY'S HOLDING THAT THE DISTRICT COURT'S REFUSAL TO REQUIRE RECIPROCAL DISCLOSURE UNDER CIPA WAS HARMLESS CONFLICTS WITH *WARDIUS* v. *OREGON* AND *KOTTEAKOS* v. *UNITED STATES*

The court of appeals declined to reverse North's convictions based on the district court's erroneous failure to enforce the reciprocal disclosure requirement of § 6(f) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. IV § 6(f), because it found that "North fail[ed] to demonstrate how he was surprised or prejudiced by prior unawareness of any of the evidence presented by the IC at trial to 'refute' his defenses." App. 103a. If the Court grants the IC's petition, it should review this holding as well for two reasons. First, by applying the relaxed harmless error standard for *nonconstitutional* error, the court of appeals' decision conflicts with *Wardius* v. *Oregon*, 412 U.S. 470 (1973), which held that compelling nonreciprocal disclosure by a defendant violates the constitutional right of due process. Second, by placing the burden of establishing prejudice on North rather than the IC, the court of appeals' decision conflicts with *Kotteakos* v. *United States*, 328 U.S. 750 (1946). The burden of proof issue presents an important question that has produced a division in the courts of appeals and warrants resolution by this Court.

A. Legal and Procedural Background

In *Wardius*, this Court held that due process "forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." 412 U.S. at 472. When the trial court "permit[s] the [government] access to information it d[oes] not also afford [the defendant], full reciprocity, as mandated by *Wardius*, cannot be said to have characterized the discovery process and consequently due process [is] denied." *Mauricio* v. *Duckworth*, 840 F.2d 454, 459 (7th Cir.), *cert. denied*, 488 U.S. 869 (1988).

CIPA requires the defendant to give pretrial notice of all classified information that he "reasonably expects to disclose or to cause the disclosure of" at trial. 18 U.S.C. App. IV § 5(a).[19] To meet the reciprocity requirement of *Wardius*, the statute provides that the district court "shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information" that the court finds to be relevant and admissible. *Id.* § 6(f); *see United States* v. *Collins*, 720 F.2d 1195, 1200 (11th Cir. 1983) (relying in part on § 6(f) in holding CIPA constitutional on its face).

North moved in April 1988 for an order declaring CIPA unconstitutional as applied to this case involving an unprecedented amount of classified material. He contended, *inter alia*, that the pretrial notice provision of CIPA would violate his right to due process under *Wardius* by forcing him to make a massive nonreciprocal pretrial disclosure.[20] In addressing North's motion, the district court recognized the extent to which classified information permeated the case:

> Some of the witnesses and defendants, particularly defendant North, operated from secure locations in the White House with full access to the most sensitive information and most critical national security intelligence methods and sources available to the government. This information, and even some methods and sources, are inextricably enmeshed in the events challenged by the indictment.

Cross-App. 6a. The court concluded that "[i]t probably was never contemplated that classified information prob-

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[19] Classified information not included in a pretrial notice may be excluded from evidence at trial. 18 U.S.C. App. IV § 5(b).

[20] North also contended that the statute would violate his Fifth and Sixth Amendment rights by forcing him to disclose pretrial his own anticipated classified testimony, and that it would violate his Sixth Amendment right to confront and cross-examine witnesses by forcing him to disclose pretrial his own anticipated classified questions and the witnesses' anticipated classified answers.

lems of this magnitude would be presented to a trial judge in a single case." Cross-App. 7a. In light of North's constitutional arguments, which the district court found to have "considerable force," Cross-App. 9a, the court ruled in part that it would "at no time review in advance . . . the subject matter to be covered by defense witnesses," Cross-App. 11a.

On November 23, 1988, the district court abruptly changed course and required North to furnish a CIPA § 5 notice by December 19 "for any and all . . . classified testimonial information." JA 418. The court directed that "this CIPA § 5 notice shall initially be filed *in camera, ex parte.*" JA 418.

On December 19, North filed *in camera* and *ex parte* his Third CIPA § 5 Notice (Testimony). JA 3393-3555. The 162-page document detailed both the general subjects about which the defense reasonably expected to elicit classified testimony from its witnesses, and numerous specific examples of that information. On December 23, the district court overruled North's objections to pretrial disclosure of the notice and ordered that it be transmitted to the IC. Cross-App. 14a-18a.[21] The district court acknowledged that "[a] substantial portion of [North's notice] contain[ed] relevant and material facts and information of value to the defendant" and "contain[ed] references to many pertinent facts and circumstances which the Court believes are likely to alert Independent Counsel to aspects of issues not previously brought to his attention." Cross-App. 15a. After receiving North's 162-page notice, the IC dropped two especially weak charges, shifted its theories of prosecution, withdrew documents and witnesses, and shaped

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[21] North filed a petition for a writ of mandamus and/or prohibition. On January 4, 1989, the court of appeals denied North's petition, but recognized that North had "raise[d] serious claims that he will suffer deprivation of constitutional rights" and had "raise[d] issues of first impression" concerning CIPA, "which has been infrequently tested through judicial review." JA 721.

its opening statement in light of North's compelled disclosures.

On February 20, 1989, North moved the district court for an order under CIPA § 6(f) and *Wardius* requiring, *inter alia*, disclosure of information that the IC expected to use to rebut the classified information in North's CIPA § 5 notices that the district court had ruled admissible. Although the district court had compelled North to make unprecedented pretrial disclosures under CIPA § 5, *the court ignored North's motion for reciprocal disclosure under CIPA § 6(f).* App. 101a-103a.

On appeal, the panel majority concluded that "the District Court erred in its handling of North's section 6(f) motion. . . . In our view, ignoring a statutorily sanctioned claim for reciprocal disclosure, without a finding that the interests of fairness do not require that disclosure, is error." App. 102a-103a. Nevertheless, even though the IC never raised the issue of harmless error, the majority held that the district court's error was harmless because "North fail[ed] to demonstrate how he was surprised or prejudiced by prior unawareness of any of the evidence presented by the IC at trial to 'refute' his defenses." App. 103a.

B. The Court of Appeals Should Have Applied the Harmless Error Standard for Constitutional Errors

The panel majority's harmless error analysis is erroneous because it applied the relaxed standard for non-constitutional error, rather than the heightened standard for errors of constitutional magnitude. When the district court commits an error that violates the defendant's constitutional rights, reversal is required unless the government can demonstrate that the error was harmless beyond a reasonable doubt. *See Chapman* v. *California*, 386 U.S. 18, 24-26 (1967).[22] By contrast, when the dis-

[22] Some constitutional errors require per se reversal, without any harmlessness inquiry. As discussed above, for example, a directed verdict can never be treated as harmless. Similarly, complete denial

trict court commits an error that does *not* violate the defendant's constitutional rights, reversal is required if the error had a "substantial influence" on the outcome of the trial or leaves the appellate court with "grave doubt" as to whether it had such an effect. *Kotteakos*, 328 U.S. at 765; *see* Fed. R. Crim. P. 52(a); 28 U.S.C. § 2111.

The majority's conclusion that the error was not of constitutional dimension conflicts with *Wardius*. As Judge Silberman declared in dissent, "North was required to disclose an enormous portion of his case, under a regime where he got nothing in return. *Wardius* forbids forced disclosure by defendants under those circumstances." App. 171a. The majority's apparent conclusion that *Wardius* was satisfied because North received *other* discovery, App. 98a n.36, 104a, misses the key point of that case: "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning *refutation of the very pieces of evidence which he disclosed to the State.*" *Wardius*, 412 U.S. at 476 (emphasis added). Because the district court refused to order reciprocal disclosure, North was subjected to the "hazard of surprise" concerning "refutation of the very pieces of evidence which he disclosed" to the IC. In light of this constitutional error, the IC should have been required under *Chapman* to demonstrate beyond a reasonable doubt that the error was harmless. App. 172a.

The majority further erred in focusing its harmless error analysis solely on whether North was "surprised" by the IC's undisclosed rebuttal evidence, while ignoring the harm to North caused by the pretrial disclosure of his own case. "Surprise" is one type of harm caused by a refusal to require reciprocal disclosure, but it is not the only type of harm; rather, "prejudice is measured *both* from North's disclosure to the IC (as to which North was surely harmed) *and* from the failure of the

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of the right to counsel and decision by a biased judge can never be harmless. *See Rose*, 478 U.S. at 577.

IC to make the required disclosures." App. 173a (emphasis added).[23] The harm to North from the district court's error was the same as if North had been forced to disclose his classified evidence to the IC under a statute that had *no* reciprocal disclosure requirement. App. 173a. Under this circumstance, "the [government] would . . . have had the benefit of nonreciprocal discovery rights," *Wardius*, 412 U.S. at 478, and that benefit—which the IC used to dismiss weak charges and otherwise plan its trial strategy, App. 172a—was severely prejudicial to North.

C. The Court of Appeals Erred in Placing the Burden of Proving Harm from Nonconstitutional Error on North

Because the court of appeals placed the burden of proof on the issue of harmless error on North, rather than on the IC, its decision also conflicts with *Kotteakos*. The burden of proof issue has produced a division in the courts of appeals that calls for resolution by this Court.

In *Kotteakos*, this Court construed the predecessor to 28 U.S.C. § 2111, the federal harmless error statute. Although the Court noted that the defendant had the burden of proving prejudice from merely *technical* errors, it made clear that the rule was different with

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[23] *Wardius* makes this point clearly. There, the defendant withheld his alibi notice because state law did not provide reciprocal disclosure, and the trial court precluded him from presenting an alibi defense. Before this Court, the State argued that the defendant should have given the notice and permitted the trial court to construe state law to require reciprocity. *See* 412 U.S. at 476-77. The Court rejected that argument. It reasoned that if—as happened in North's case—the defendant had given his notice and the trial court had *not* ordered reciprocal disclosure, the defendant would have been irreparably harmed "since, once having given the State his alibi information, he could not have retracted it," and the prosecution "would still have had the benefit of nonreciprocal discovery rights . . . ." *Id.* at 478.

respect to errors that have a natural tendency to affect substantial rights: "But that this burden does not extend to all errors appears from the statement which follows immediately [in the legislative history]. 'The proposed legislation affects only technical errors. *If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding the legislation rest upon the one who claims under it.*'" 328 U.S. at 760 (emphasis added) (quoting H. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)); *see id.* at 765 ("[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.").

Drawing upon *Kotteakos*, the Tenth Circuit recently indicated that "[e]xcept possibly for minor, technical errors for which there is no reasonable possibility that the verdict could have been affected, the government ordinarily has the burden of proving that a non-constitutional error was harmless." *United States* v. *Rivera*, 900 F.2d 1462, 1469 n.4 (10th Cir. 1990) (en banc); *see also United States* v. *Grier*, 866 F.2d 908, 920 (7th Cir. 1989). ("Unlike the [*Chapman*] harmless error standard, the government is not required to demonstrate that [nonconstitutional] error was harmless beyond a reasonable doubt. Rather, the government must establish only that the error had no 'substantial influence on the verdict.'") (quoting *Kotteakos*, 328 U.S. at 765).[24] Similarly, in *United States* v. *Farnham*, 791 F.2d 331 (4th Cir. 1986), which involved a violation of the rule requiring sequestration of witnesses, the court placed

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[24] By contrast, the Third Circuit has placed the burden of proving prejudice from at least some nonconstitutional error (a variance between the indictment and proof) on the appellant. *See United States* v. *Adams*, 759 F.2d 1099, 1110 (3d Cir.) (citing *Kotteakos*), *cert. denied*, 474 U.S. 906 (1985).

the burden of proving absence of prejudice on the government. The court found that

> any defendant in Farnham's position would find it almost impossible to sustain the burden of proving the negative inference that the [witness'] testimony would have been different had he been sequestered. A strict prejudice requirement of this sort would be not only unduly harsh but also self-defeating, in that it would swallow a rule carefully designed to aid the truth-seeking process and preserve the durability and acceptability of verdicts.

Id. at 335. Accordingly, the court reversed one of the defendant's three convictions and declined to reverse the other two only because it was satisfied that the violation of the rule "could not have affected the outcome" as to those counts and that "any presumption of prejudice [was] rebutted." *Id.* at 335-36.

The court of appeals in this case placed the burden of proving prejudice on North without acknowledging *Kotteakos* or the decisions of the courts of appeals requiring the government to show an absence of prejudice. App. 103a. This allocation of the burden was particularly unfair because of the difficulty in establishing specific prejudice from the compelled, nonreciprocal disclosure of North's CIPA notice. The district court's error clearly was "of such a character that its natural effect [was] to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 760 (quotation omitted). Indeed, *Wardius* characterized such a compelled, nonreciprocal disclosure as "fundamentally unfair." 412 U.S. at 476. Yet it is virtually impossible for North to quantify the extent to which he was harmed by surprise and the threat of surprise from evidence that the IC should have been required to disclose, or the extent to which the compelled disclosure of his 162-page CIPA notice benefitted the IC. It is precisely this situation—where error has occurred but prejudice, or the lack of prejudice, is difficult to determine—that the allocation of the burden of proof

is most critical.[25] By placing the burden on North, the panel majority effectively insulated the district court's error from appellate review. As the Fourth Circuit declared under analogous circumstances in *Farnham*, a "strict prejudice requirement" of the sort imposed by the panel majority "would swallow" CIPA § 6(f), which, like the rule at issue in *Farnham*, is "carefully designed to aid the truth-seeking process." 791 F.2d at 335.

CONCLUSION

If the Court grants the IC's petition for a writ of certiorari over North's opposition, then the cross-petition for a writ of certiorari should be granted as well.

Respectfully submitted,

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[25] Justice Stevens has suggested that harmless error analysis should not apply *at all* to nonconstitutional error "when the harmlessness of an error cannot be measured with precision." *United States* v. *Lane*, 474 U.S. 438, 474 (1986) (Stevens, J., dissenting); *see id.* at 462 (Brennan & Blackmun, JJ., concurring) (noting that Justice Stevens "may well be correct"); *cf. Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978) (harmless error analysis does not apply to constitutional error of joint representation because the analysis would involve "unguided speculation") (quotation omitted).

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Crim. No. 88-0080

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER, OLIVER L. NORTH,
RICHARD V. SECORD, ALBERT HAKIM

June 22, 1988

MEMORANDUM AND PRELIMINARY ORDER RE CIPA

GESELL, District Judge.

The Court has before it the joint motion of the four defendants entitled Motion of Defendants for a Declaration that Section 5 of the Classified Information Procedures Act, and the Protective Order Entered April 15, 1988, Are Unconstitutional (Defendants' Joint Pretrial Motion No. 4). The motion has been fully briefed and argued.

Introduction

The Classified Information Procedures Act ("CIPA"), 18 U.S.C.App. IV, was designed to provide a mechanism in criminal cases that might involve disclosure of classified information by a defendant which would provide the Government sufficient information at an early stage to decide whether or not the possible harm to national se-

curity created by a defendant's need to disclose classified information outweighs the benefit to the public interest which is derived from prosecution of criminal charges. To this end, Congress established a series of primarily pretrial procedures to enable a trial judge to rule on the use, relevance or admissibility of the classified information requested by a defendant before any public disclosure during trial or pretrial proceedings.

Although prior decisions in other Circuits have upheld the constitutionality of CIPA,[1] this motion focuses on the constitutionality of the Act, particularly Section 5, as it applies to this unusual case. Here, serious issues arise because, unlike cases to date, the events covered by the indictment, much of the conduct of the participants—defendants and witnesses alike—and many of the intelligence methods and sources they employed are highly classified. In these circumstances a defendant seeking to use classified documents at the trial is required under a literal application of CIPA to reveal his defense before the trial starts and is confronted with other related obstacles and disadvantages. This is made apparent by a brief exposition of the provisions of the statute.

CIPA

Under CIPA, the classified information defendant reasonably expects to present or elicit from witnesses during trial proceedings in open court must go through a three-step process before it may be disclosed. First, the defendant is required to notify the Government and the court in writing of any classified information he reasonably expects to present or elicit from witnesses in pretrial or trial proceedings held in open court. Following

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[1] *See United States v. Wilson*, 750 F.2d 7, 9-10 (2d Cir.1984), *cert. denied*, 479 U.S. 839, 107 S.Ct. 143, 93 L.Ed.2d 85 (1986); *United States v. Wilson*, 721 F.2d 967, 976 (4th Cir.1983); *United States v. Jolliff*, 548 F.Supp. 229, 231 (D.Md.1981). *See also United States v. Collins*, 720 F.2d 1195, 1200 (11th Cir.1983).

such notice, the Government may move for a hearing before the Court on the admissibility of the classified information at issue. Once the Court determines the use, relevance or admissibility of the classified information, it then must decide whether the information will be fully disclosed in open court or whether it is appropriate for the information to be presented in an alternative substituted or redacted form. The CIPA provisions detailing these three steps are discussed below.

Section 5(a) of CIPA provides in relevant part:

> If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing.

This section further specifies that the defendant's notice is to "include a brief description of the classified information" the defendant expects to present or elicit from witnesses. Until a specific item of classified information is properly noticed, defendants are prohibited from disclosing that information during trial or pretrial proceedings. In addition, Section 5(b) authorizes the Court to preclude the defendant from disclosing any classified material "not made the subject of notification" and to prohibit the defendant from "examin[ing] . . . any witness with respect to any such information."

Section 6 establishes proceedings for the determination by the court of the admissibility of classified information noticed by the defendant. It provides that the government may request a hearing on "all determinations concerning the use, relevance or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." CIPA § 6(a). The hear-

ing is to be held publicly unless the government certifies that classified information will be compromised and an *in camera* hearing is necessary. This section effects only the timing of determinations of use, relevance or admissibility by the court; the evidentiary standards for admissibility remain those currently applicable to all criminal cases.

Prior to the hearing, the government is required under Section 6(b) to identify for the defendant the classified information that will be at issue. Such notice to the defendant requires specific identification of the classified information at issue if the government has already made the information available to the defendant. Otherwise, the government may provide the defendant with a generic categorization of the information when approved by the court. Further, whenever the government requests a Section 6 hearing, upon request of the defendant the Court may order the government "to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing." *Id.* § 6(b)(2).

If the government's motion for a hearing has been timely filed prior to the pretrial or trial proceeding, the court must make its rulings on admissibility before the proceeding commences. *Id.* § 6(a). The Court is to set forth in writing the basis for its determinations as to each classified item reviewed. *Id.* If following an *in camera* hearing the Court deems classified information at issue to be inadmissible, the *in camera* record is to be sealed in the event of a post-trial appeal by the defendant. *Id.* § 6(d). The defendant, in addition, may seek reconsideration of the court's ruling at any time before or during trial. *Id.*

Whenever the court authorizes disclosure of specific classified information by the defendant at trial, the government may move for the court to order "the substitu-

tion for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove" or "the substitution for such classified information of a summary of the specific classified information." *Id.* § 6(c)(1)(A)-(B). The government's motion for alternative disclosure of admissible classified information will be granted by the court only if it finds that "the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." *Id.* In connection with the motion for alternative disclosure, the government may submit to the court an affidavit by the Attorney General certifying that disclosure of the information would damage national security and identifying the basis for the information's classification. *Id.* § 6(c)(2).

If the court denies a motion by the government for alternative disclosure of classified information, the government may file an affidavit by the Attorney General objecting to the disclosure of the information at issue. *Id.* § 6(e)(1). Upon receipt of such an affidavit, the court is to order the defendant not to "disclose or cause the disclosure of such information." *Id.* Section 6(e) then sets forth suggested, but not exclusive, remedial measures the court might impose to ensure the defendant's ability to fully present his defense. Whenever the defendant is prevented by Section 6(e)(1) from disclosing or eliciting from witnesses classified information, the court shall dismiss the indictment unless it determines that other remedial measures should be taken in the interests of justice. *Id.* § 6(e)(2). Such remedial measures may include orders dismissing specific counts of the indictment, finding against the government on any issue to which the excluded information relates, or striking or precluding all or part of a witness' testimony. *Id.* § 6(e)(2)(A)-(C). Remedial measures are not to take effect, however, until the government has had both an opportunity for interlocutory appeal, as provided by Section

7, and, thereafter, an opportunity to withdraw its objection to the disclosure of the classified information at issue. *Id.* § 6(e)(2).

Comment

This brief recital of the convoluted procedures contemplated under CIPA is sufficient alone to demonstrate that strict application of the statute to this proceeding would not only be difficult, but impossible to accomplish consistent with a fair and expeditious resolution of this case. A few facts already established in the existing pretrial record make this conclusion immediately apparent. Some of the witnesses and defendants, particularly defendant North, operated from secure locations in the White House with full access to the most sensitive information and most critical national security intelligence methods and sources available to the government. This information, and even some methods and sources, are inextricably enmeshed in the events challenged by the indictment. Approximately 50,000 pages of "core" documents so designated by the prosecution as being of possible relevance and materiality are being made available to defendants *in camera*, and the bulk still remain classified in whole or in part.[2] Other documents presenting classification problems are still forthcoming under the Court's broad discovery Order. Two defendants, Poindexter and North, sought generalized unlimited further disclosures which would have involved the search of millions of extremely sensitive documents over an extended period of many, many months.[3] Some of the agency witnesses to be called at trial hold high positions in the government, deal daily with classified information, and were involved in cooperative intelligence arrangements between this country and its allies, arrangements

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[2] The prosecution has even been unwilling to disclose, *in camera*, certain materials to all of the defendants during informal discovery.

[3] This motion was denied and reconsideration is also denied.

which were activated to aid authorized initiatives mentioned in the indictment. Throughout the documents, individuals still in covert status are mentioned and a few may be witnesses. Moreover, as far as the record discloses, there was no advance consideration by the Attorney General as to how his request for an Independent Counsel grand jury investigation of Oliver North and others might affect national security if indictments were eventually returned. Accordingly, much of the testimony and exhibits used in the grand jury proceedings was originally classified and portions remain in this status.

It will be impossible to conduct this case under the precise strictures of CIPA, not only because of this broad intrusion into classified areas of information but also because it is impossible in advance to determine and correctly rule on all issues of relevance, materiality and admissibility. It probably was never contemplated that classified information problems of this magnitude would be presented to a trial judge in a single case. Nor was CIPA primarily designed for a case where a defendant was the author or recipient of much of the classified data and had not himself been charged with making unauthorized disclosures of the information.

Fortunately, Congress was alert to the fact that special cases might create special problems. It made clear that in any case involving classified information the defendant should not stand in a worse position because of such information than he would have if there were no such statutory procedures. 1980 U.S.Code Cong. & Admin. News 4294, 4302. To this end, Congress commented that it expected the trial judge "to fashion creative and fair solutions" for classified information problems. *Id.* at 4301. At the same time, it emphasized that the Court should not undertake to balance the national security interests of the government against the rights of the defendant but rather that in the end remedies and sanctions against the government must be designed to make the

defendant whole again. *Id.* at 4303. Thus while a limited opportunity for creative judicial adjustment of CIPA procedures exists, in the end, defendant's constitutional rights must control.

While afforded this leeway, the Court is unable to determine definitely at this stage whether or not the classified document problems presented by this case can be resolved. It proposes to make the effort but the complexity of the situation defies obvious answers. Final ruling on the motion must await further developments.

It will aid discussion to focus on defendant North, the first defendant who will be tried. At this point, after several weeks of vigorous pretrial activity, Independent Counsel has already submitted the documents he intends to offer when presenting his case-in-chief. This submission is somewhat incomplete and defendant North's objections have not been heard. These materials are contained in six boxes of unclassified and now fully declassified documents and four boxes of documents with proposed redactions or substitutions for portions of classified information. The classified information has been disclosed to defendant North under seal, together with the proposed substitutes designed to safeguard aspects of special national security concern. Accordingly, the nature of the confidential material in these documents is fully known to defendant North because the full text has been supplied and apparently will continue to be supplied to him and his counsel, *in camera.* Discovery is scheduled to end July 1, 1988.

Thus, the case is now in a posture where defendant North [4] must soon invoke section 5 under CIPA and notice Independent Counsel of any classified portions of the papers in the discovery materials or particular, clearly

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[4] Notices from other defendants not now scheduled for trial can be deferred.

identified documents otherwise known to him which he believes are required for his defense. North must also separately comment on reductions and substitutions in the government's case-in-chief at a date to be set. Counsel for North, by reason of his client's past employment and prior proceedings in the Iran-contra matter, is well aware of classified procedures and the events in issue and thus is unusually qualified to provide a precise, highly particularized notice.

The Court must recognize that there remain procedural aspects of particular concern to each of the defendants and particularly defendant North. Counsel for North has urged that strict application of CIPA will force North to reveal to the government well in advance his strategy, his evidence, and, indeed, even aspects of his defense. He suggests this will include the following: the testimony of defense witnesses; the reasons for requesting classified documents he plans to introduce at trial; the classified information he expects to elicit from prosecution government witnesses by cross-examination; and the contents of defense counsel's questions, to the extent they may reasonably be expected to elicit classified information. Counsel urges that North's own proposed testimony must be disclosed well before he has even decided whether or not to take the stand, and that the opening and closing statements of counsel must be reviewed in advance. This, it is argued with considerable force, will place North at a practical and tactical disadvantage, infringing upon his constitutional rights under the Fifth and Sixth Amendments. These considerations lie at the heart of defendants' constitutional challenge. The Court has determined that many of these concerns can hopefully be avoided by applying pretrial procedures consistent with the congressional intent underlying CIPA. A way must be found to preserve defendant's constitutional rights that still affords adequate protection for national security concerns.

Accordingly, the Court:

(1) Directs defendant North to file his Section 5 notice by July 11, 1988. The notice may be later supplemented as to documents not received by that date in legible form or by delay in fulfilling the Court's discovery Order. The notice shall satisfy the standard for specificity of notice set out in *United States v. Collins*, 720 F.2d 1195, 1199 (11th Cir.1983), and shall cover the documents or other information possessed by North that contains classified information he reasonably expects to disclose in any manner during trial. The notice may be accompanied by a precise demand for other classified materials revealed by the formal and informal discovery and a particularized and clearly identifiable demand for separate documents known to defendant that he requires for his defense. The undifferentiated discovery already rejected by the Court shall not be reinstituted in the guise of such a demand.

(2) The Court will hear counsel for defendant North at what may prove to be more than a single *in camera, ex parte* oral presentation commencing on July 14, 1988, at 9:30 a.m., for the sole purpose of being informed, without disclosure to Independent Counsel, of the reasons why he and his counsel consider the specific items of classified information he is seeking under (1), above, to be required as relevant and material to his defense.[5] During this hearing process the Court may explore alter-

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[5] The hearings, in any event, will be held *in camera* because the Court has determined in its discretion that closure is essential to protect classified materials that are not relevant and material to the issues, that because of the highly sensitive nature of some of these materials the governmental interest in their protection is compelling and that there is no reasonable lawful alternative available for the fair and impartial administration of justice consistent with the Constitution in this limited instance. *See Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982).

native means of providing the classified data desired by North in nonclassified form, or in an alternative overall narrative presenting defendant's factual version of his defense or a substantial segment of same in the form of stipulations.

(3) Thereafter, the Court will rule as to the relevance and materiality of items so noticed as promptly as possible, but without revealing defense strategy. Its decisions will be sent directly to the interagency declassification group. When appropriate, a ruling on an item may have to be deferred pending developments at trial. The Court reserves the right to consult the interagency declassification group informally about the content of a particular document. Independent Counsel shall not be informed of any such consultation.

(4) After the Court rules on the classified materials so noticed, the interagency declassification group will then review whether any further classified information can be released as the rulings may require and so advise the Court and Independent Counsel. Independent Counsel will then be provided the opportunity to seek redaction or substitution under Section 6(c) of CIPA. Thereafter, the Court will consider what further steps are necessary in the light of what has developed.

In outlining the various steps still necessary before trial, the volume of documents requires that processing at the Section 5 stage and the subsequent reference of rulings to the interagency declassification group must proceed intermittently as documents are noticed while other documents remain to be identified for notice or await ruling. The Court will expect completion of the process to the Section 6(c) stage before August 1, 1988.

(5) The Court will at no time review in advance defense counsel's opening statement, proposed defense questions or the subject matter to be covered by defense witnesses. It contemplates only that counsel for North will proceed at all times within the scope allowed by the

Court's rulings on the notices, that counsel will so advise defense witnesses, and that the Court will be advised sufficiently in advance if unexpected developments during trial indicate to defense counsel a pressing need to proceed beyond these strictures so that further court ruling can be obtained.

(6) There will be no review of defendant North's testimony in advance. When and if he is about to testify, his counsel will advise the Court if it then appears the testimony will involve classified national security disclosures beyond those then authorized under prior rulings of the Court and, again, a specific further ruling will be obtained.

This procedure preserves the essential protections of CIPA but in a manner that does not impair defendant's rights. There is no reason to believe that Mr. Sullivan, defendant North's highly professional, experienced counsel will knowingly abuse the Court's willingness to allow the case to proceed without the excessive judicial supervision that CIPA might require under different circumstances.

(7) There is no present need to alter the Court's Protective Order.

One final matter touching on CIPA is presented by a separate series of briefs directed to the nature of Independent Counsel's CIPA authority. He is, in the Court's view, responsible for the investigation and prosecution of this case under each of his dual appointments. He has advised the Court that he will proceed with deference to the Executive's national security concerns as expressed to him through the interagency declassification group with which he has closely collaborated.

This question of where ultimate authority rests under CIPA as between the Attorney General and Independent Counsel under various circumstance that may arise from this point on under Section 6(c) or otherwise is not ripe for decision. Common sense suggests the Attorney Gen-

eral should immediately appoint a statutory designee under CIPA for all purposes so that his designee can be informed of any serious national security concerns, if and when they arise, both by the Justice Department's representative on the interagency declassification group and by Independent Counsel. This would assure a prompt, informed mutual decision by the Attorney General and Independent Counsel should any major issue concerning disclosure of classified material arise at any future stage of this case and minimize delay.

Conclusion

The defendants' joint motion to declare the provisions of CIPA, particularly as applied to this case, and the Court's Protective Order unconstitutional is denied, without prejudice to await further developments, and the Court declines to rule on the status of Independent Counsel under that Act at this time for lack of ripeness, awaiting the Attorney General's possible appointment of a designee under that statute.

SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Crim. No. 88-0080-02

UNITED STATES OF AMERICA

v.

OLIVER L. NORTH

Dec. 23, 1988

MEMORANDUM AND ORDER RE DEFENDANT'S THIRD CIPA NOTICE (TESTIMONY)

GESELL, District Judge.

The Classified Information Procedures Act, 18 U.S.C. App. ("CIPA") applies to classified testimony as well as to classified documents. Classified information is defined in Section 1 of that Act as including "information and material" subject to classification or otherwise requiring protection from public disclosure. Information, of course, includes knowledge derived from one's work experience and hence, proposed testimony falls under the restrictions of CIPA.

Pursuant to the Court's pretrial responsibilities under CIPA, it directed North on November 23, 1988 to file a written statement of relevant and material testimony he expects to disclose or cause to be disclosed in his defense.[1] North responded, over objection, attaching a Warning

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[1] This and prior Orders have also led to processing of the classified material in North's documentary case.

Notice [2] to a narrative statement of classified information he desires to use or present at trial. This document consists of 162 typewritten pages and, as directed by the Court, was filed *ex parte* under seal.

The Court now confronts a need to disclose this narrative to Independent Counsel for pretrial processing as required by Sections 5 and 6 of CIPA—a course of action which North vigorously resists on the ground that this requirement is unconstitutional and violates his rights under the Fifth and Sixth Amendments.

The Court has closely examined the narrative statement in the light of its knowledge of the issues and proof gained over approximately ten months of intense pretrial activity. The nature of the notice is indicated below:

(1) A substantial portion of the narrative statement contains revelant and material facts and information of value to the defendant, which may be presented eventually in testimony or which may be used during cross-examination of government witnesses.

(2) Some of the facts noted in the narrative statement are known to Independent Counsel and some are immaterial. However, the statement contains references to many pertinent facts and circumstances which the Court believes are likely to alert Independent Counsel to aspects of issues not previously brought to his attention.

(3) The narrative statement, while somewhat evidentiary in character, does not indicate which individuals mentioned will be witnesses, nor does it develop in any detail how most the facts mentioned will be proven.

(4) The narrative statement does not tie the information to any particular count in which North is charged or undertake to support statements by documentation found in North's own case or in papers disclosed to him by the government during the elaborate documentary discovery.

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[2] Appendix A to this Memorandum.

(5) The narrative statement is by its very nature only partially revealing because it makes no reference, of course, to related nonclassified proof which could place the classified information noticed into clearer perspective or significance.

(6) The narrative statement does not commit North to call any witness and does not identify any witnesses.

(7) In no way does the narrative represent, directly or indirectly, that North himself will or will not testify; when he may testify, if he does; or what he would testify about if he were to testify.

Given these circumstances, the Court has determined that immediate processing of the narrative statement under CIPA is appropriate for several major reasons.

A. CIPA mandates pre-trial disclosure. Under the Act it is necessary to inform the government of the extent to which sensitive classified information is likely to be revealed during trial (whether through testimony, cross-examination or opening statement) so that both Independent Counsel and the Attorney General can perform their separate responsibilities under Section 6 of CIPA. *See, Memorandum and Preliminary Opinion Re CIPA*, filed June 22, 1988 at 15, 16.

B. CIPA's required pre-trial disclosure to Independent Counsel cannot be modified because this is not a case where limited classified information is only an incidental part of the case and disclosure could perhaps be deferred. Rather, in this instance classified information surrounds and immerses the entire case for both sides.

C. Trial is set to commence January 31, 1989.

North's constitutional claims lack merit. No further hearing is necessary. North has previously briefed the issues and there has been full argument in connection with his motion to declare CIPA unconstitutional on its face and as applied.

As to the Fifth Amendment due process claim, modern pretrial practice in complex criminal cases contemplates extensive pretrial disclosures by the parties in the interests of ascertaining the truth. Recent decisions of the Supreme Court as well as the Federal Rules of Criminal Procedure make this abundantly clear. *See, e.g., United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975); *Wardius v. Oregon*, 412 U.S. 470, 473, 93 S.Ct. 2208, 2211, 37 L.Ed.2d 82 (1973); Fed.R.Crim.P. 12.1, 12.2, 16, 32(c)(3)(A), (C). North has had access to approximately 900,000 pages of government documents; the classified documents the government will use against him have been identified, as have the witnesses; and North will receive all Jencks material, including grand jury testimony, two weeks before trial. The prosecution has recently filed several memoranda narrowing the issues in the case and explicating some aspects of its theory of the case. In addition, over several days of CIPA § 6 hearings, at which defense counsel were present, the Independent Counsel explained the significance to its theory of the case of many of the classified documents in its case-in-chief, and Independent Counsel responded frankly to the Court's numerous inquiries about its case. The Court cannot accede to North's view of due process that one is entitled to get everything and to disclose nothing. Due process is an even-handed concept and this claim is rejected.

As to North's Sixth Amendment claim, disclosure involves no significant interference or substantial prejudice to North's right to the effective assistance of counsel. His attorneys are still free to call or not to call any witness and equally free to determine what questions to ask or not to ask. The tactical disadvantage that may accrue by minimizing surprise is slight. Government witnesses cannot readily adjust or coordinate their testimony to meet the defense, as North suggests, because they are committed under oath and otherwise to their positions. Moreover, the federal courts have long recognized that a degree of defense disclosure is necessary to prevent introduction

of vital or unexpected proof, which has a tendency to force adjournment delay to permit investigation or to resolve new legal problems presented. *Williams v. Florida*, 399 U.S. 78, 80-86, 90 S.Ct. 1893, 1895-1898, 26 L.Ed.2d 446 (1970). It is the Court's obligation to assure issues are delineated before trial commences. *See*, Fed.R.Crim.P. 17.1. The fact that the alleged violations in this instance occurred behind the screen of classification over a period of time should not place this defendant in any different position; indeed, it enhances the need for pre-trial disclosure by the defense.

North has by his Warning Notice apparently anticipated this ruling and has indicated he desires to seek relief by some kind of application to the Court of Appeals. The Court has given no consideration to the merits, or lack of merit, of such an application. It will, however, delay transmitting the narrative statement to Independent Counsel.

Accordingly, defendant North and his counsel are hereby notified that the narrative statement will be transmitted to Independent Counsel under seal by 4:00 p.m. on January 3, 1989 for processing by Independent Counsel and consideration by the Attorney General, where appropriate under CIPA. Independent Counsel shall submit proposed redactions and substitutions *in camera* on or before January 11, 1989.

SO ORDERED.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 88-0080—02-GAG

UNITED STATES OF AMERICA

v.

OLIVER L. NORTH,

Defendant.

(EX PARTE, UNDER SEAL)
(CONTAINS CLASSIFIED INFORMATION)

WARNING NOTICE

THIS PLEADING CONTAINS DEFENSE WORK PRODUCT PROVIDED TO THE COURT ONLY OVER DEFENSE OBJECTIONS.

DEFENDANT OBJECTS TO ANY REPRODUCTION OR DISCLOSURE OF THE CONTENTS OF THIS WORK PRODUCT. DISCLOSURE WILL VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS.

DISCLOSURE OF CRIMINAL DEFENSE WORK PRODUCT ON THIS SCALE EVEN TO THE COURT IS UNPRECEDENTED.

DEFENDANT REQUESTS NOTICE AND AN ADEQUATE OPPORTUNITY TO BE HEARD (BOTH IN THIS COURT AND BY MANDAMUS

OR APPEAL) PRIOR TO ANY DISCLOSURE OF THE CONTENTS OF THIS FILING.

DEFENSE WORK PRODUCT PROVIDED OVER OBJECTION. REPRODUCTION OR DISCLOSURE WILL VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS.

APPENDIX C

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

TITLE 18, UNITED STATES CODE

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

APPENDIX E

TITLE 18, UNITED STATES CODE, APPENDIX IV CLASSIFIED INFORMATION PROCEDURES ACT

§ 1. Definitions

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954.

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

§ 2. Pretrial conference

At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any matters which relate to classified information or which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

§ 3. Protective orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified

information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

§ 4. Discovery of classified information by defendants

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

§ 5. Notice of defendant's intention to disclose classified information

(a) Notice by defendant.—If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified

information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) Failure to comply.—If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

§ 6. Procedure for cases involving classified information

(a) Motion for hearing.—Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice.—(1) Before any hearing is conducted pursuant to a request by the United States under subsection

(a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a) of this section, the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative procedure for disclosure of classified information.—(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of records of in camera hearings.—If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure.—(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) of this section and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

(f) Reciprocity.—Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

§ 7. Interlocutory appeal

(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of

appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

§ 8. **Introduction of classified information**

(a) Classification status.—Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) Precautions by court.—The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

(c) Taking of testimony.—During the examination of a witness in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safe-

guard against the compromise of any classified information. Such action may include requiring the United States to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

§ 9. Security procedures

(a) Within one hundred and twenty days of October 15, 1980, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

(b) Until such time as rules under subsection (a) of this section first become effective, the Federal courts shall in each case involving classified information adopt procedures to protect against the unauthorized disclosure of such information.

§ 10. Identification of information related to national defense

In any prosecution in which the United States must establish that material relates to the national defense or constitutes classified information, the United States shall notify the defendant, within the time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense.

§ 11. Amendments to Act

Sections 1 through 10 of this Act may be amended as provided in section 2076, Title 28.

§ 12. Attorney General guidelines

(a) Within one hundred and eighty days of October 15, 1980, the Attorney General shall issue guidelines specifying the factors to be used by the Department of Justice in rendering a decision whether to prosecute a violation of Federal law in which, in the judgment of the Attorney General, there is a possibility that classified information will be revealed. Such guidelines shall be transmitted to the appropriate committees of Congress.

(b) When the Department of Justice decides not to prosecute a violation of Federal law pursuant to subsection (a)of this section, an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute. The findings shall include—

(1) the intelligence information which the Department of Justice officials believe might be disclosed,

(2) the purpose for which the information might be disclosed,

(3) the probability that the information would be disclosed, and

(4) the possible consequences such disclosure would have on the national security.

§ 13. Reports to Congress

(a) Consistent with applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the Attorney General shall report orally or in writing semiannually to the Permanent Select Committee on Intelligence of the United States House of Representatives, the Select Committee on Intelligence of the United States Senate, and the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and House of

Representatives on all cases where a decision not to prosecute a violation of Federal law pursuant to section 12(a) has been made.

(b) The Attorney General shall deliver to the appropriate committees of Congress a report concerning the operation and effectiveness of this Act and including suggested amendments to this Act. For the first three years this Act is in effect, there shall be a report each year. After three years, such reports shall be delivered as necessary.

§ 14. Functions of Attorney General exercised by Deputy Attorney General, the Associate Attorney General, or designated Assistant Attorney General

The functions and duties of the Attorney General under this Act may be exercised by the Deputy Attorney General, the Associate Attorney General, or by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official.

§ 15. Effective date

The provisions of this Act shall become effective upon October 15, 1980, but shall not apply to any prosecution in which an indictment or information was filed before such date.

§ 16. Short title

That this Act may be cited as the "Classified Information Procedures Act".

APPENDIX F

TITLE 28, UNITED STATES CODE

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

APPENDIX G

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

(2)

No. 90-1501

MAY 7 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

OLIVER L. NORTH, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, CROSS-RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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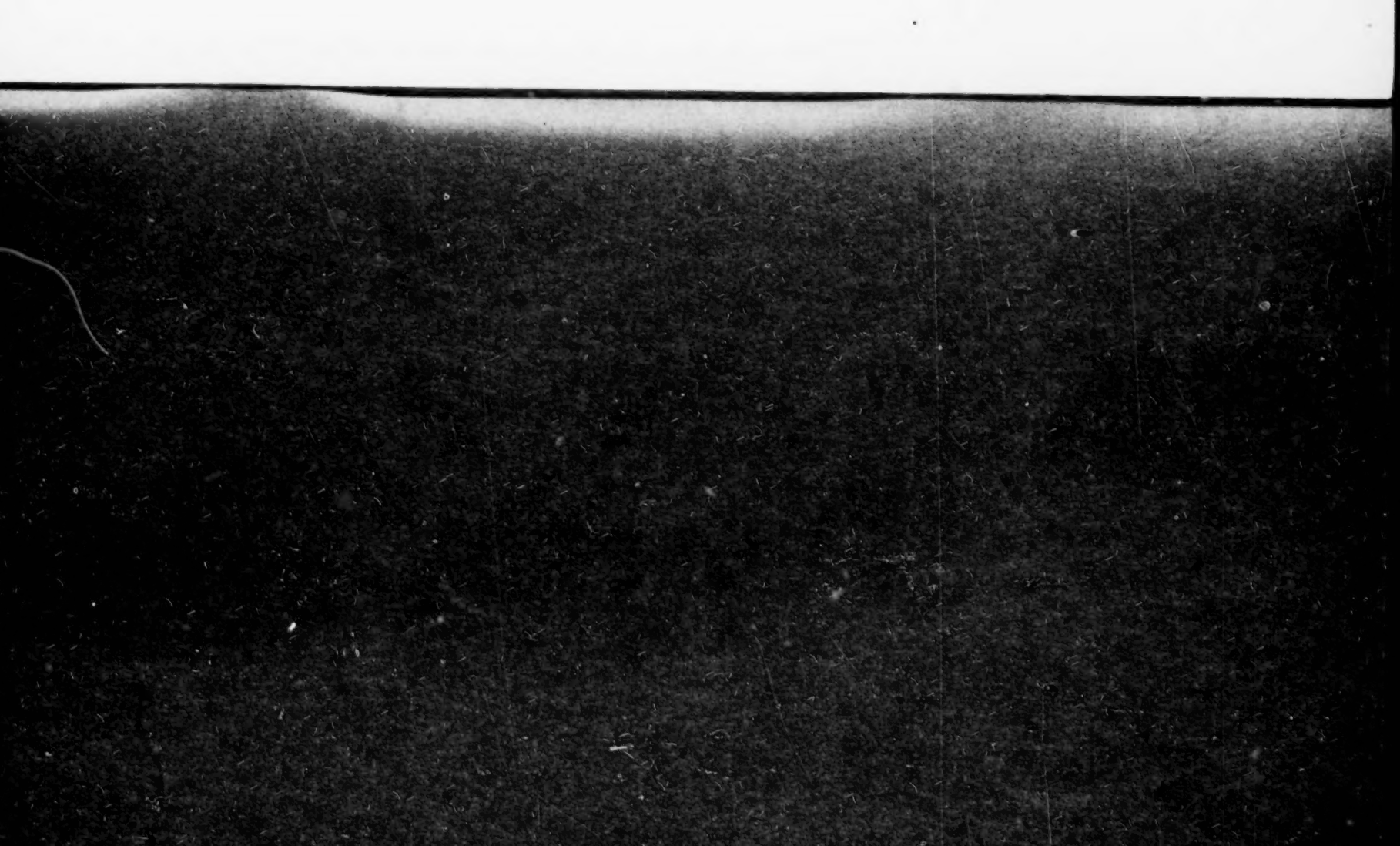

QUESTIONS PRESENTED

1. Whether failure to submit an element of the offense to the jury may be harmless error when other findings by the jury make clear that it believed the omitted element to have been proved.

2. Whether knowledge of unlawfulness is an element of the offense under 18 U.S.C. 1505.

3. Whether the discovery procedures in this case denied the defendant due process.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1501

OLIVER L. NORTH, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, CROSS-RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The procedural history of this case is set out in our petition for a writ of certiorari in *United States* v. *North*, No. 90-1337, which describes the decisions of the courts below on cross-petitioner North's successful Fifth Amendment challenge to his convictions on three counts. North also unsuccessfully advanced a number of other claims; some of those challenges are the subject of his cross-petition. The background relevant to those contentions is set out below.

1. Count 6 of the indictment charged North with aiding and abetting the obstruction of congressional inquiries into the sale of arms to Iran and the provision of assistance to Nicaraguan rebels known as "Contras," in violation of 18 U.S.C. 1505 and 2. That statute proscribes "corrupt" acts or endeavors to influence, obstruct, or impede "the due and proper exercise of the power of inquiry under which any inquiry or investigation is being

had" by Congress. In particular, the indictment alleged that North participated in the preparation of a false and misleading chronology of events concerning the shipment of arms to Iran, for use in briefing members of Congress. The indictment also alleged that North altered, destroyed, concealed, and removed National Security Council documents as part of an endeavor to obstruct congressional inquiries. JA 251-253.[1]

At the close of evidence, the parties agreed that the offense stated in Section 1505 has four elements: that a congressional inquiry was pending; that the defendant was aware of the inquiry; that the defendant endeavored to obstruct the inquiry; and that the defendant did so with the requisite corrupt intent. See Pet. App. 84a. The district court, however, found " 'as a matter of law that congressional inquiries were pending' " *(id.* at 84a, quoting JA 635), and it accordingly instructed the jury to deliberate only as to the other three elements of the offense. JA 635-636. As for the mental element, the court instructed the jury that it could convict only upon finding that North acted with specific intent, which the court defined as requiring "that a person not only acted knowingly, voluntarily and deliberately, but that he acted with a bad purpose, having decided in his mind what he would do, and that he then did something prohibited." *Id.* at 673. The court added that "the obstruction counts involved not only this element of specific intent but the defendant must have acted corruptly. In the obstruction counts a deliberate, knowing bad purpose is not enough to convict. [The defendant] must be shown beyond a reasonable doubt to have had the bad purpose to act in the precise manner the statute was intended to prevent."

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[1] "JA" refers to the joint appendix in the court of appeals; "Pet. App." refers to the appendix to our petition for a writ of certiorari, No. 90-1337; "Cross-Pet. App." refers to the appendix to the cross-petition.

JA 574; see *id.* at 574-575.[2] North was convicted, and the district court declined to set aside the verdict. See Pet. App. 307a-308a.

The court of appeals found that the district court erred in not submitting the first element of the Section 1505 offense to the jury. Pet. App. 84a. But, citing this Court's decision and Justice Scalia's concurrence in *Carella* v. *California*, 491 U.S. 263 (1989), the court of appeals held that such an error is "subject to harmless error analysis when no rational jury could find the other elements of the offense without finding the fact presumed." Pet. App. 85a. And on its review of the record, the court held the error here harmless beyond a reasonable doubt. The court found it "clear from North's own trial testimony * * * not only that congressional inquiries were in fact pending in November 1986, but also that he himself realized that they were pending at that time." *Id.* at 86a. With this in mind, the court concluded that "no rational jury could find that North knew of the pending congressional investigation, endeavored to obstruct it, and did so with specific corrupt intent without concomitantly finding that the investigation was pending in the first place." *Id.* at 87a (footnote omitted).[3]

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[2] The district court declined to instruct the jury on an "authorization defense," which would have required it to return a verdict of not guilty upon finding that North had reasonably relied on the authority of his superiors. See Pet. App. 56a. Instead, the court instructed the jury to disregard evidence of authorization in determining whether North acted with specific intent unless "'the defendant was specifically ordered and directed by a superior to act contrary to the law, and if no alternative was available to him to comply with the order by other lawful means . . . [and if] he reasonably believed the order was legally proper.'" *Ibid.*, quoting JA 674-675.

[3] Judge Silberman dissented on this point. Pet. App. 208a-217a. In his view, "under relevant Supreme Court decisions reversal is automatically required when the judge, as here, directs a verdict on an essential element of that crime, no matter how overwhelming—or even uncontested—the evidence is on that issue." *Id.* at 209a. He distinguished *Carella* as addressing only "the error of shifting

The court of appeals also held that the district judge did not err in his charge relating to the mental element of the Section 1505 offense. Pet. App. 61a-68a. The court explained that, "[a]lthough the violation of this statute is a 'specific intent' offense, 'the mental state required for most "specific intent" offenses does not involve knowledge of illegality.'" *Id.* at 67a (citation omitted). It followed that, "because knowledge of illegality was not required, [North] was not entitled to an instruction that the jury should consider authorization as bearing on knowledge of illegality." *Ibid.* The court added that "'corruptly' and the other words in the statute are to be understood according to their common meanings, necessitating no specific definitional instructions from the court." *Id.* at 68a. See *id.* at 62a-63a. The court therefore concluded that, "[i]f the jury was convinced beyond a reasonable doubt that North's creation of a false chronology was an intentional (as defined in the instructions) endeavor corruptly to influence the congressional investigation (as defined in the common use and sense of those terms), then it was the jury's duty to return a verdict of guilty." *Id.* at 68a.[4]

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the burden of proof." *Id.* at 212a. See *id.* at 213a. He also was of the view that other circuits have "refus[ed] to apply harmless error analysis when trial judges direct a verdict in favor of the government on any essential element of a crime." *Id.* at 213a-214a. Finally, he concluded that the error here was not harmless. *Id.* at 215a-217a.

[4] Judge Silberman again dissented. Pet. App. 174a-191a. Like the majority, he "decline[d] to hold here that section 1505 requires knowledge of unlawfulness." *Id.* at 178a-179a. He also "tend[ed] to agree with the Majority's statement * * * that North was 'entitled only . . . to a jury that applied "corruptly" according to its usual definitions.'" *Id.* at 183a. But he found that the jury was not instructed to do that here (see *ibid.*), reasoning that Section 1505 "requires the prosecution to prove that the endeavor * * * was depraved, evil, or wrongful." *Id.* at 184a. And he concluded that in making this determination, the jury "must be permitted to consider, at the very least, evidence tending to show that the defendant believed that the nature of his conduct (as opposed to its under-

2. a. Much of the pretrial wrangling in this case involved application of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. IV, which comes into play when a criminal case may involve the disclosure of classified information. Under Section 5(a) of CIPA, the defense must (on pain of the exclusion of its evidence, see Section 5(b)) provide "a brief description" to the prosecution, prior to trial, of all the classified information that it "reasonably expects to disclose or to cause the disclosure of." The government then may seek a hearing under Section 6(a) to determine the "use, relevance, and admissibility" of the defense's classified information; Section 6(b) obligates the government, prior to this hearing, to notify the defense of the items whose disclosure it will contest. If the court determines that the classified information propounded by the defense is admissible, Section 6(c) allows the government to substitute an admission, or a summary of the classified data, so long as that "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." Finally, if the district court determines that classified information may be disclosed at trial, Section 6(f) provides that "the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information."

b. In this case, the district judge announced in his first CIPA order that his goal was "to make the defendant whole." Cross-Pet. App. 7a-8a. To this end, at the outset the judge issued a broad discovery order to the government that ultimately required it to disclose some 900,000 pages of documents. Pet. App. 98a n.36. The

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lying justification) was appropriate—that is, in accordance with the law." *Id.* at 187a. He therefore found that "a fair reading of section 1505 sustains North's objections to strictures placed on the jury's consideration of the evidence of authorization in the record." *Id.* at 179a.

judge then directed North to file his CIPA Section 5 notice by July 11, 1988 (later delayed to August 1, 1988). Cross-Pet. App. 10; Pet. App. 98a-99a. When the defense filed this document, however, the district court rejected it "as 'wholly insufficient' because it lacked 'necessary particularization' as to the relevance and materiality of the documents noticed." Pet. App. 99a. The district judge later observed that he had "tested North's notice against some of the documents noticed and concluded that the filing was obviously submitted in bad faith." *United States* v. *North* (*North I*), 708 F. Supp. 389, 393 (D.D.C. 1988).[5] The court nevertheless invited the filing of a second CIPA notice by November 14, 1988, without prejudice to the defense. *Ibid.*

The court subsequently found North's second CIPA notice equally unacceptable, explaining that it "reflected a deliberate disregard of the Court's Order. It seeks disclosure of masses of classified material which under no conceivable version of a defense could have any utility whatsoever." *North I*, 708 F. Supp. at 395. The court contrasted this with the discovery offered by the government, which provided North "the documents [it] intended to introduce at trial in the case-in-chief," "turned over thousands of other documents developed during Independent Counsel's inquiry," and advised North "of the witnesses Independent Counsel intended to call at the trial." *Id.* at 391. In all, the court observed that the government's disclosures placed North "in a unique position not required by CIPA and perhaps never so generously awarded any federal criminal defendant faced with a need to use classified documents at trial." *Ibid.* The court accordingly concluded that North's "counsel's tactical disregard of the Court's orders" (*id.* at 398) justified preclusion, pursuant to CIPA Section 5(b), of North's use of certain classified material at trial. *Id.* at 395-399. So as not to unduly prejudice the defense, however,

[5] This order does not appear in the appendix to the cross-petition.

the court permitted North to identify up to 300 classified documents—approximately the number designated by the government for use in its case-in-chief—for use at trial, directing him to specify the relevance and materiality of these items. *Id.* at 398-399.

In response to this order (and to another issued on November 23, 1988 (see JA 418)), North designated documents and submitted a "narrative statement" (Cross-Pet. App. 14a-15a) that the district court determined to provide to the government. While noting that the statement contained some useful information, the court observed that the statement did not indicate which individuals would be called as witnesses, did not develop in detail how facts would be proved, and did not tie information to any particular count. *Id.* at 15a. Again pointing to the extensive disclosures made by the government, the court concluded that it could not "accede to North's view of due process that one is entitled to get everything and disclose nothing." *Id.* at 17a.

After reviewing the narrative statement, the district court observed that it "weaves together classified information relating to hundreds of topics or incidents, often in a rather disjointed fashion," and "does not tie this classified information to particular counts." *United States* v. *North* (*North II*), 713 F. Supp. 1436, 1437 (D.D.C. 1989).[6] As for the classified materials designated by North, the court noted that it "has in most cases been unable to determine why North believes a particular document is relevant and material to the remaining counts" (*id.* at 1437-1438); the government declared itself equally befuddled by North's filing. See *id.* at 1438. At the same time, the court stated that North and his counsel "have remained, in spite of the Court's urging, unwilling to advise the government, except occasionally in the most generalized terms, why they believe that a particular document or portion of a document is relevant, material and

[6] This order is not included in the appendix to the cross-petition.

required in defending the case." *Ibid.* So as to avoid "legal gridlock," the court accordingly set out categories of classified information that the defense could use at trial. See *id.* at 1438-1439. The court did not respond to North's motion under CIPA Section 6(f) for disclosure of material that the government would use in rebutting his classified information. See Pet. App. 101a. After trial, however, the court denied North's motion to hold CIPA unconstitutional as applied, finding it "absolutely clear that CIPA, as applied under scores of rulings by the Court, has not denied defendant North his right to a fair trial." JA 512.

c. The court of appeals held that the district judge erred in failing to rule on North's Section 6(f) motion. Pet. App. 102a. The court held the error harmless, however, explaining that North "has adduced no evidence of prejudice resulting from the District Court's error. Despite the benefit of a full trial record, North fails to demonstrate how he was surprised or prejudiced by prior unawareness of any of the evidence presented by the [Independent Counsel] at trial to 'refute' his defenses." Pet. App. 103a. The court also noted that the district judge in several instances provided North with "more procedural safeguards than CIPA requires." *Ibid.* And it found that, "[i]n sum, the District Court's implementation of CIPA ultimately required each side to reveal substantial aspects of its arguments to its opponents. This result was envisioned by Congress, * * * and is consistent with the 'salutary' development of 'a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.'" *Id.* at 105a (citation omitted), quoting *Wardius* v. *Oregon*, 412 U.S. 470, 473-474 (1973).[7]

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[7] Judge Silberman again dissented. Pet. App. 169a-174a. He reasoned that the "disclosure provisions of CIPA would be unconstitutional if the reciprocity section were not part of the Act. Therefore, if the district judge 'amends the statute' by simply refusing to enforce that portion he renders it unconstitutional." *Id.* at 170a-

DISCUSSION

A. The District Court's Failure To Instruct The Jury On An Element Of The Section 1505 Offense Was Reviewable Under A Harmless Error Standard And Was Harmless Beyond A Reasonable Doubt

North first contends (Cross-Pet. 7-13) that the district court's failure to submit an element of the Section 1505 offense to the jury was not susceptible to harmless error analysis. As the court of appeals explained, however, the conduct of a harmless error inquiry in this case was wholly consistent with this Court's decisions. And no court of appeals has embraced a contrary rule in circumstances such as those present here. Review on the merits accordingly is not warranted.

1. In recent years, this Court has held that mandatory, conclusive presumptions requiring the jury to find that particular elements of the offense have been established, although violative of constitutional rights to jury trial or due process, may nevertheless be subject to harmless error analysis. *Carella* v. *California*, 491 U.S. 263 (1989). See also *Rose* v. *Clark*, 478 U.S. 570 (1986) (rebuttable presumption subject to harmless error analysis). The Court also has held that instructions misdescribing elements of the offense may be found harmless. *Pope* v. *Illinois*, 481 U.S. 497 (1987).

Justices have, of course, expressed differing views on the nature of the harmless error inquiry in such circumstances (see *Carella*, 491 U.S. at 270-271 (Scalia, J. concurring in the judgment))—an issue that is now pending before the Court in *Yates* v. *Evatt*, No. 89-7691 (argued Jan. 8, 1991). But there has been agreement

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171a. With this in mind, Judge Silberman concluded that the district judge's failure to grant North's Section 6(f) motion was reversible error unless harmless beyond a reasonable doubt. *Id.* at 162a. He found that the error was not harmless under that standard. *Id.* at 172a-174a.

that, at a minimum, such errors may be held harmless when there is reason to believe, not only that a properly instructed jury *would have* found all the elements of the offense to be present, but that the defendant's jury *in fact* found all of those elements to have been established. That will be the case when the jury's findings on related issues make clear that it must have believed the omitted element to have been proved. See *Carella*, 491 U.S. at 266; *id.* at 270-271 (Scalia, J., concurring). For similar reasons, harmless error inquiry is appropriate when it appears that the "error did not play any role in the jury's verdict" (*Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion)), as where a misinstruction involved "an element of the crime that the defendant in any case admitted." *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment).

North thus is incorrect in asserting (Cross-Pet. 10) that the Court has drawn a distinction between instructions "that shift the burden of proof," which he acknowledges are subject to harmless error analysis, and those "that preclude the jury from considering an element of the offense," which he contends are not. After all, mandatory presumptions (and erroneous instructions that fail to require findings as to particular elements of the offense) do more than shift the burden of proof; they "directly foreclose[] independent jury consideration of whether the facts proved established certain elements of the offense[]." *Carella*, 491 U.S. at 266. Instead, the line drawn by the Court separates cases where the jury made *no* findings that relate to the omitted element from those where "other facts necessarily found by the jury are so closely related" to the omitted element that "those findings [are] * * * functionally equivalent to finding the element required to be presumed." *Id.* at 271 (Scalia, J., concurring in the judgment).

In the latter category of cases, a harmless error inquiry is not equivalent to "'entering a judgment of con-

viction or directing the jury to come forward with such a verdict.'" *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1256 (1991) (White, J., dissenting), quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977). To the contrary, the inquiry in such a case concerns the significance of the jury's verdict, a determination that may be made without difficulty on the existing record. *Rose*, 478 U.S. at 579 n.7. Similarly, when the defendant acknowledges the existence of an element of the offense, "'the reviewing court can be confident that [the] error did not play any role in the jury's verdict.'" *Carella*, 491 U.S. at 270 (Scalia, J., concurring in the judgment), quoting *Johnson*, 460 U.S. at 87 (plurality opinion).

That is precisely the analysis used by the court below in holding the district court's error harmless. The court of appeals reviewed the record and found it "clear from North's trial testimony * * * not only that congressional inquiries were in fact pending in November 1986, but also that he himself realized that they were pending at that time." Pet. App. 86a. And citing Justice Scalia's concurrence in *Carella*, the court determined that, "in light of North's own testimony, no rational jury could find that North knew of the pending congressional investigation, endeavored to obstruct it, and did so with specific corrupt intent without concomitantly finding that the investigation was pending in the first place." *Id.* at 87a (footnote omitted). These fact-specific determinations plainly were correct;[8] they do not, in any event, warrant this Court's consideration.

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[8] North devotes two footnotes in his petition to an attack on the factual premises of the court of appeals' decision. Pet. 8-9 n.7, 11-12 n.10. He evidently means to challenge (see Pet. 11-12 n.10) the court's conclusion that a rational jury could not have found the final three elements of the offense "without concomitantly finding that the investigation was pending in the first place." Pet. App. 87a. But the jury was instructed that it could convict only "if all jurors agree beyond a reasonable doubt that North took an act to

2. Despite occasional broad language in the decisions, North is incorrect in asserting (Cross-Pet. 10-11) that the courts of appeals are in conflict on the application of harmless error analysis to cases such as this one. It is true that the single post-*Carella* decision cited by North (at Pet. 11), *United States* v. *Dunkel*, No. 89-1841, 1991 U.S. App. LEXIS 3599 (7th Cir. March 8, 1991) at *4, observed that "the error cannot be harmless" when a district judge fails to instruct the jury on "one of the elements of the offense." But the *Dunkel* court did not—and on the record before it, had no occasion to—address the question whether other findings by the jury (or concessions by the defendant at trial) might establish harmlessness.[9] Other post-*Carella* decisions

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obstruct *the same congressional inquiry* with the requisite specific and corrupt intent and knowledge of the pending inquiries." JA 636 (emphasis added). The jurors therefore must have had in mind a particular, existing congressional inquiry that was the subject of North's obstructive conduct. Indeed, as the same testimony—provided by North himself—established both the pendency of the inquiries and North's knowledge of that pendency (see Pet. App. 86a), it is hardly likely that a rational jury might have found the latter element without also finding the former. While elliptically acknowledging his concession at trial that a congressional inquiry was pending, North also contends that his testimony "concerned only his knowledge of the Iran inquiry" (Pet. 8 n.7); North argues that the jury might not have relied on that concession because "[t]he jury's verdict on Count 6 does not disclose whether it found that North aided and abetted an endeavor to obstruct an *Iran* inquiry, a *Contra support* inquiry, or both" (*ibid.* (emphasis in original)). As the court of appeals explained, however, the question whether the obstructive acts related to the subject matter of the inquiry "is one of 'pertinency,' not 'pendency,' and is therefore a question of law for the court rather than for the jury." Pet. App. 88a n.30. That conclusion plainly is correct (see *Kungys* v. *United States*, 485 U.S. 759, 772 (1988); *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929)), and North does not take issue with it in his cross-petition.

[9] In *Dunkel*, a prosecution for failure to file an income tax return, the district court refused to instruct the jury that "mistaken interpretations of the tax laws * * * defeat the mental state necessary to the offense, no matter how unreasonable those beliefs may be." 1991 U.S. App. LEXIS 3599, at *2. No other findings by the jury

have made clear that failure to instruct on an element of the offense is subject to harmless error inquiry. See *Martinez* v. *Borg*, No. 89-56163, 1991 U.S. App. LEXIS 7314 (9th Cir. April 25, 1991), at *5; *Hennessy* v. *Goldsmith*, No. 89-16251, 1991 U.S. App. LEXIS 5032 (9th Cir. April 1, 1991), at *12. See also *Hill* v. *Maloney*, 927 F.2d 646 (1st Cir. 1990) (harmless error analysis applied to conclusive presumption); *United States* v. *Dotson*, 895 F.2d 263, 265 (6th Cir. 1990) (harmless error analysis applied to ambiguous instruction), cert. denied, 111 S. Ct. 94 (1990). As for the pre-*Carella* decisions cited by North, it is not at all clear that they remain good law;[10] in any event, like *Dunkel*, none of them considered whether a harmless error inquiry is appropriate when the omitted element is subsumed within other findings made by the jury.[11]

Given the recent decision in *Carella* and the pendency of *Yates* v. *Evatt*, in our view there is no need for the Court to revisit the issue presented here. Indeed, because

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shed light on whether the defendant held a mistaken but good faith belief that he did not have to file tax returns.

[10] Citing *Carella*, *Pope*, and *Rose*, the Sixth Circuit has observed that one of the decisions relied upon by North, *United States* v. *Mentz*, 840 F.2d 315 (6th Cir. 1988), "may not be long for this world." *Dotson*, 895 F.2d at 265. See *Hennessy*, LEXIS *11. It should be noted, however, that the court nevertheless indicated that, "whatever the Supreme Court might think of [it, *Mentz* remains] binding precedent" in the circuit. *Dotson*, 895 F.2d at 265. Similarly, the Seventh Circuit in *Dunkel* cited with approval another decision offered by North, *United States* v. *Kerley*, 838 F.2d 932 (7th Cir. 1988).

[11] See *Mentz*, 840 F.2d at 323-324; *United States* v. *Kerley*, 838 F.2d 932, 933-935, 938-939 (7th Cir. 1988); *United States* v. *White Horse*, 807 F.2d 1426, 1427-1429 (8th Cir. 1986); *United States* v. *Goetz*, 746 F.2d 705, 709 (11th Cir. 1984). The cases cited by North on this point (see Pet. 12 n.10) are inapposite; they simply do not, in terms, address the applicability of harmless error inquiry. See *United States* v. *Johnson*, 718 F.2d 1317, 1323 (5th Cir. 1983) (en banc); *United States* v. *Singleton*, 532 F.2d 199, 207 (2d Cir. 1976).

the court below applied the more restrictive of the harmless error tests argued by the parties in *Yates*, it seems most unlikely that anything in the pending *Yates* decision could bear on the outcome of this case. See *Yates*, No. 89-7691 Pet. Br. 18-19, 35-36; *id.*, Resp. Br. 19-24. Having said that, however, caution nevertheless suggests that it would be appropriate for the Court to hold North's cross-petition (assuming that the Court grants our petition) pending the decision in *Yates*; when this case is finally resolved, North's harmless error contention—which, it should be emphasized, affects only one of the counts on which he was convicted—may be reconsidered if anything in *Yates* calls into question the correctness of the court of appeals' decision.

B. Proof Of Knowledge Of Illegality Is Not Required Under 18 U.S.C. 1505

In another contention that concerns only Count 6, North asserts (Cross-Pet. 14-21) that the courts below did not require proof of the requisite mental state under Section 1505. While North refers (Cross-Pet. 14 & n.11, 19-20 n.15, 21 & n.18) to the district court's remarks on authorization, he appears to have abandoned the argument (rejected by the court below (see Pet. App. 56a-61a)) that he was entitled to an instruction on the defense of official authorization. Instead, his contention now reduces to the assertion that conviction under Section 1505 requires proof of the defendant's "*subjective* knowledge of illegality," so that "the district court should have instructed the jury that Count 6 required proof that North knew his conduct was unlawful." Cross-Pet. 21 (emphasis in original). This contention is wholly without merit.

North grounds his argument on what he terms (Cross-Pet. 15) the "fundamental principle" that "specific intent for serious federal offenses that embrace some apparently innocent conduct requires proof of subjective knowledge of wrongfulness or illegality," which he draws from two of this Court's decisions, *Cheek* v. *United States*, 111 S. Ct. 604 (1991), and *Liparota* v. *United States*, 471 U.S.

419 (1985). But those decisions, both of which involve the application of particular statutory language, stand for no such principle. The holding in *Cheek*—a prosecution under 26 U.S.C. 7201 and 7203 for willful evasion of taxes—"turn[ed] on the meaning of the word 'willfully' as used in §§ 7201 and 7203." 111 S. Ct. at 606. Recognizing "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution" (*id.* at 609), the Court reversed the convictions only because it has "interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws." *Ibid.* See *id.* at 610-611. Similarly, *Liparota* involved an interpretation of 7 U.S.C. 2024(b)(1), which subjects to punishment "whoever knowingly uses" food stamps "in any manner not authorized by [the statute] or the regulations" (see 471 U.S. at 420); the Court held that the term "knowingly" conditions the "in any manner" language, explaining that the statute otherwise would have no mens rea requirement. *Id.* at 424-426.[12]

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[12] The decisions of the courts of appeals cited by North (Cross-Pet. 16 n.12) are similarly off the point. In *United States* v. *Rhone*, 864 F.2d 832 (D.C. Cir. 1989)—which is, in any event, another decision of the District of Columbia Circuit—the court held only that knowledge of illegality is necessary to establish "specific intent to defraud the government" under 18 U.S.C. 1341 and 1342, and D.C. Code 22-3811, -3812(a), and -3812(b). Whether or not this holding is correct, it is tied to the particular fraud offenses at issue; in reaching its conclusion, the court noted that its holding was an "exception" to the rule that "ignorance of the law is generally not a defense." 864 F.2d at 835. *United States* v. *Golitschek*, 808 F.2d 195 (2d Cir. 1986), was a prosecution under 18 U.S.C. 371 and 1343 for evading export restriction regulations. The court held that the charged offenses required proof of "knowledge of a legal requirement" (808 F.2d at 202)—that is, the regulations—but did not obligate the government to establish that the defendant was aware that his activities were subject to prosecution.

These holdings simply have no application here. The term "willfully" does not appear in Section 1505, and the statute's language does not parallel that of 7 U.S.C. 2024 (b)(1). Instead, Section 1505 reaches persons who "corruptly" commit specified obstructive acts. And so far as we are aware, no court ever has interpreted use of the word "corruptly" in any statute to require proof of knowledge of illegality.[13] That is so, in particular, of the

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[13] The cases cited by North certainly stand for no such proposition. *United States* v. *Reeves*, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834 (1985) (cited at Cross-Pet. 17, 20), involved a prosecution under 26 U.S.C. 7212(a), which imposes penalties upon one who "corruptly * * * endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title." The court nowhere suggested that knowledge of unlawfulness was requisite for conviction; to the contrary, the court said it would be enough if the defendant "meant to impede or intimidate officers or agents of the Internal Revenue Service from collecting his just debt of taxes due or from scrutinizing his tax accounts." 752 F.2d at 1002. (The court also reasoned that the term "corruptly" should be given a less expansive reading under Section 1503 than under Section 7212(a) "because [Section 1503] covers only actions related to pending judicial proceedings, thus providing adequate notice to potential violators" (*id.* at 799); in this regard, Section 1505, which reaches only actions related to pending congressional inquiries, stands on the same footing as Section 1503). Similarly, *United States* v. *McElroy*, 910 F.2d 1016 (2d Cir. 1990) (cited at Cross-Pet. 19 n.14), defined the term "corruptly" in 18 U.S.C. 215(a) as referring "'to acts done voluntarily and intentionally with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful means.'" 910 F.2d at 1021, quoting *United States* v. *Brunson*, 882 F.2d 151, 154 n.2 (5th Cir. 1989). This definition, of course, requires a purpose to do an act that is illegal, not a purpose to violate the law. Indeed, *Brunson*, the decision from which the *McElroy* court drew its definition, expressly rejected the contention that the "word 'corruptly' * * * reflects an intent to require a high degree of intent of an offender. [The defendant] offers no authority in support of his argument and we have found none.'" 882 F.2d at 154. It may be added that the instruction on specific intent given below is virtually

many courts that have interpreted Section 1505 and its companion obstruction of justice provision, 18 U.S.C. 1503.[14] Any danger that the statute might be applied to reach "apparently innocent conduct" (Cross-Pet. 18) is, as the court below suggested, obviated by the jury's application of the word "'corruptly' * * * according to [its] common meaning[]" (Pet. App. 68a)—a meaning that reaches, among other things, conduct that is "'of debased political morality'" and characterized by "'improper political or legal transactions or arrangements,'" or is "'inconsistent with official duty and the rights of others.'" *Id.* at 63a (citations omitted).

It hardly need be added that this is not, in fact, a case involving "apparently innocent conduct." As the jury found—indeed, as North essentially conceded at trial (see Pet. App. 86a)—the defendant created a false chronology to be used in briefing Congress, and "altered, destroyed, and concealed official documents in this same time frame." *Ibid.* That use of deceit or misdirection to thwart a con-

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identical to the language from *McElroy* that North cites with approval. See JA 672-673 ("Specific intent requires that a person not only acted knowingly, voluntarily, and deliberately, but that he acted with a bad purpose, having decided in his mind what he would do, and that he then did something prohibited").

[14] See *e.g.*, *United States* v. *Mitchell*, 877 F.2d 294, 299 (4th Cir. 1989) (act with intent to obstruct inquiry violates Section 1505); *United States* v. *Laurins*, 857 F.2d 529, 536-537 (9th Cir. 1988), cert. denied, 109 S. Ct. 3215 (1989) (act with intent to obstruct violates Sections 1503 and 1505); *United States* v. *Jeter*, 775 F.2d 670, 679 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) (specific intent to obstruct violates Section 1503); *United States* v. *Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982) (purpose to obstruct justice is violation of Section 1503). The Section 1503 decision cited by North (at Cross-Pet. 20 n.16), *United States* v. *Thomas*, 916 F.2d 647, 651 (11th Cir. 1990), is consistent with this authority; the "corrupt motive" referred to in that case may be established by "show[ing] that the defendant knowingly undertook an action from which an obstruction of justice was a foreseeable result." *Ibid.*

gressional inquiry surely was "of debased political morality" and was "inconsistent with official duty," and therefore was "corrupt[]" within the meaning of Section 1505.[15]

C. The Discovery Provided North More Than Satisfied The Requirements Of Due Process

1. North's final contention (Cross-Pet. 22-30) challenges the district court's failure to order the disclosure of rebuttal evidence under CIPA. Relying on *Wardius* v. *Oregon*, 412 U.S. 470 (1973), North insists that, whenever a defendant is obligated to provide material to the government in discovery, the Constitution requires the government to disclose the evidence that it will use to rebut the defendant's disclosures. North accordingly concludes that the district court's failure to order the disclosure of rebuttal evidence after he made his CIPA submission was constitutional error that the government was obligated to prove harmless beyond a reasonable doubt.

This contention, which rests on a patent misreading of *Wardius*, is without substance. *Wardius* did not hold that the Constitution requires the government to supply and identify *rebuttal* evidence. Instead, the Court recognized a rule, grounded on the Due Process Clause, that "discovery must be a two-way street. The State may not insist that trials be run as a 'search for the truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." 412 U.S. at 475 (footnote omitted). The rule of *Wardius* thus requires the government to offer discovery of the same quantum and nature as that required of the de-

[15] In these circumstances, as the court of appeals explained, "because knowledge of illegality was not required, [North] was not entitled to an instruction that the jury should consider authorization as bearing on knowledge of illegality." Pet. App. 67a. The district court's instruction thus was overly generous to North; "the trial court might well have omitted any reference to authorization." *Id.* at 65a.

fense, so as to maintain "the balance of forces between the accused and his accuser." *Id.* at 474.

The Seventh Circuit therefore has explained, in a decision cited with approval by North (Cross-Pet. 22), that "reciprocity dictate[s] only that the defense be entitled to the same scope of discovery to which the prosecution was entitled, nothing less and nothing more." *Mauricio* v. *Duckworth*, 840 F.2d 454, 459 (7th Cir.), cert. denied, 488 U.S. 869 (1988). See *id.* at 459 n.7. As a consequence, the courts uniformly have held that, so long as the government offers sufficient discovery to prevent undue surprise, violations of Fed. R. Crim. P. 12.1(b)—which requires the government to disclose the information it will use to rebut evidence of an alibi provided by the defendant in discovery—must be assessed under a nonconstitutional harmless error standard. See, *e.g.*, *United States* v. *Vela*, 673 F.2d 86, 89 (5th Cir. 1982); *United States* v. *Portillo*, 633 F.2d 1313, 1324 (9th Cir. 1980), cert. denied, 450 U.S. 1043 (1981); *McClendon* v. *United States*, 587 F.2d 384, 388 (8th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Floyd*, 555 F.2d 45, 48 n.7 (2d Cir.), cert. denied, 434 U.S. 851 (1977).[16]

The government's disclosures here, viewed against those provided by North, more than met the *Wardius* reciprocity standard. The narrative discovery offered by North, which addressed classified information to be introduced through testimony, was something less than enlightening. It "weaves together classified information relating to

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[16] The language from *Wardius* that is cited by North (Cross-Pet. 26)—that it is unfair to subject a defendant "to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State" (412 U.S. at 476)—is taken dramatically out of context. In *Wardius*, which concerned a notice-of-alibi rule, the state had provided no discovery at all. See *id.* at 475. And as the outcome in such a case turns entirely on the validity of the alibi, the only meaningful discovery for the government to offer is that bearing on the defendant's alibi evidence.

hundreds of topics or incidents, often in a rather disjointed fashion," and does "not tie this classified information to particular counts" (*North II*, 713 F. Supp. at 1437). As for the classified documents designated by the defense, North's counsel "remained, in spite of the [district] Court's urging, unwilling to advise the government, except occasionally in the most generalized terms, why they believe that a particular document or portion of a document is relevant, material and required in defending the case." *Id.* at 1438.

In addition, while North's narrative offered what the district judge regarded as some useful information (see Cross-Pet. App. 15a), it "does not indicate which individuals mentioned will be called as witnesses, nor does it develop in any detail how most of the facts mentioned will be proved." *Ibid.* It also "does not tie the information to any particular count in which North is charged or undertake to support statements by documentation." *Ibid.* And it "is by its very nature only partially revealing because it makes no reference * * * to related nonclassified proof." *Id.* at 16a. Indeed, "[a]fter examining the classified documentary and testimonial material," the district court declared that both it and the government were "in most cases * * * unable to determine why North believes a particular document is relevant and material to the remaining counts." *North II*, 713 F. Supp. at 1437-1438.

In contrast, the government provided North some 900,000 pages of documents in discovery, identifying both the classified documents and the witnesses it would use against him. Cross-Pet. App. 17a. It "filed several memoranda narrowing the issues in the case and explicating some aspects of its theory of the case." *Ibid.* And "over several days of CIPA § 6 hearings, at which defense counsel were present, the Independent Counsel explained the significance to its theory of the case of many of the classified documents in its case-in-chief, and Independent Counsel

responded frankly to the Court's numerous inquiries about its case." *Ibid.* In these circumstances, the district court provided North's CIPA submission to the government precisely because it could not "accede to North's view of due process that one is entitled to get everything and to disclose nothing. Due Process is an even-handed concept * * *." That determination—and the court of appeals' parallel conclusion (see Pet. App. 103a-105a)—is fully consistent with *Wardius*.

In fact, while it might have been better for the district court to have addressed North's Section 6(f) motion explicitly, the court would have acted well within its discretion in denying the motion. As the district court observed, given the disjointed nature of North's submission, "[t]he government * * * indicated both orally and in writing its inability to relate the documentary materials to its understanding of the issues in the case" (*North II*, 713 F. Supp. at 1438)—an inability that the district court shared. See *id.* at 1437-1438. With North's submission in such a state, it is difficult to imagine how the government could have offered particularized rebuttal evidence. The district judge thus found it "abundantly clear" that his application of CIPA did not deny North a fair trial. JA 512.

2. North's claim (Pet. 27-30) that the court of appeals' decision is in conflict with the harmless error rule of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), is similarly insubstantial. In fact, is is "well settled that '[a]n error in administering the discovery rules is not reversible unless shown to be prejudicial to the substantial rights of the defendant.'" *McClendon*, 587 F.2d at 388, quoting *United States* v. *Krohn*, 558 F.2d 390, 394 (8th Cir.), cert. denied, 434 U.S. 868 (1977). See, *e.g.*, *Vela*, 673 F.2d at 89; *Portillo*, 633 F.2d at 1324. Cf. *United States* v. *Miller*, 471 U.S. 130, 134 (1985) (reversal of conviction not appropriate because "there can be no showing" of prejudicial surprise). Here, of course, no such showing was made. See Pet. App. 103a, 105a.

And given the extraordinary disclosure obligations placed on the government, there plainly was no basis for a reviewing court to "conclude[] that [the] error may have had 'substantial influence' on the outcome of the proceeding." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988), quoting *Kotteakos*, 328 U.S. at 765. See *United States* v. *Lane*, 474 U.S. 438, 449 (1986) (no reversal unless error "results in actual prejudice").

North also suggests that the courts of appeals are in conflict on which party bears the burden of proof in a harmless error inquiry. He acknowledges, however (Cross-Pet. 27), that the defendant must establish prejudice when the error did not affect his substantial rights. And that plainly is the case here. While "the District Judge did not move straightforwardly down the procedural path set out in section 6 [of CIPA]" (Pet. App. 101a-102a), he accorded the defense an enormous amount of discovery from the government; his only error lay in failing expressly to deny North's motion for "rebuttal" discovery under Section 6(f). In substance, then, North got everything (if not more) than he deserved. It is particularly appropriate in a case such as this one to place the burden of going forward with evidence of prejudice on the defense; North is far better situated than is the government to identify particular pieces of prosecution evidence that caused him prejudicial surprise. He has, of course, failed to point to any such evidence.

CONCLUSION

If the petition for a writ of certiorari in No. 90-1337 is granted, the cross-petition should be held for disposition as appropriate in light of *Yates* v. *Evatt*, No. 89-7691.

Respectfully submitted.

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No. 90-1501

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

OLIVER L. NORTH,
Cross-Petitioner,
v.

UNITED STATES OF AMERICA,
Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CROSS-PETITIONER'S REPLY MEMORANDUM

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CROSS-PETITIONER'S REPLY MEMORANDUM

I. THE PARTIAL DIRECTED VERDICT

In its effort to show that the panel majority's harmless error analysis on Count 6 can be squared with prior cases, the IC leaves the impression that the district court merely failed to instruct the jury on the "pending inquiry" element of 18 U.S.C. § 1505.[1] In fact, the district court did not just *omit* the "pending inquiry" element; the court *decided that element itself* and explicitly *precluded* the jury from considering whether an inquiry was pending. The district court instructed the jury "as a matter of law" that "inquiries were pending" and informed the jury that "[y]ou need only deliberate regarding the other three elements." App. 84a; JA 545-46. Because this case involves a directed verdict on the pending inquiry element, and not merely a failure to instruct on that element, the post-*Carella* failure-to-instruct decisions upon which the IC relies (Cross-Opp. 13)[2] are inapposite.

Similarly, the cases that the IC cites (Cross-Opp. 9, 10, 13) involving presumptions and misinstructions do not suggest that harmless error analysis is appropriate

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[1] *See* Cross-Respondent's Brief in Opposition ("Cross-Opp.") i, first Question Presented ("failure to submit an element of the offense to the jury"); *id.* at 3 ("district court erred in not submitting the first element" to the jury); *id.* at 9, heading A. ("Failure To Instruct The Jury On An Element Of The Section 1505 Offense"); *id.* at 9 ("the district court's failure to submit an element of the Section 1505 offense to the jury"); *id.* at 10 ("instructions that fail to require findings"); *id.* at 13 ("failure to instruct on an element of the offense"); *id.* (omitted element").

[2] *See Martinez* v. *Borg*, No. 89-56163, 1991 U.S. App. LEXIS 7314 (9th Cir. Apr. 25, 1991) (failure to instruct that aider and abettor must have specific intent to aid principal's crime); *Hennessy* v. *Goldsmith*, No. 89-16251, 1991 U.S. App. LEXIS 5032 (9th Cir. Apr. 1, 1991) (failure to instruct on "voluntary release" element of kidnapping offense). Neither of these cases discusses whether a directed verdict on an element of the offense can be harmless.

when the district court decides an element of the offense.[3] Several of those cases expressly distinguish presumptions and misinstructions from partial directed verdicts. In *Rose* v. *Clark*, 478 U.S. 570 (1986), for example, this Court declared that "[b]ecause a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Id.* at 580 n.8 (quotation omitted); *see Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) (citing *Rose*, Court holds misinstruction subject to harmless error analysis because jurors "were not precluded from considering" an element).

The IC asserts that the partial directed verdict in this case is equivalent to a mandatory presumption (and therefore subject to harmless error analysis) because such presumptions " 'directly foreclose[] independent jury consideration of whether the facts proved establish certain elements of the offense[].' " Cross-Opp. 10 (quoting *Carella* v. *California*, 491 U.S. 263, 266 (1989)). But as this Court made clear on the same page of *Carella* that the IC cites, a presumption, unlike a partial directed verdict, does not entirely preclude the jury from determining whether an element has been proven: " 'Nor is *Sandstrom* error equivalent to a directed verdict for the State. When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. *Connecticut* v. *Johnson*, 460 U.S. 73, 96-97 (1983) (Powell, J., dissenting).' " *Carella*, 491 U.S. at 266 (quoting *Rose*, 478 U.S. at 580). As Justice Powell pointed out in *Johnson*,

> [a] directed verdict removes an issue completely from the jury's consideration. [A conclusive] pre-

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[3] *See Carella* v. *California*, 491 U.S. 263 (1989) (conclusive presumption); *Pope* v. *Illinois*, 481 U.S. 497 (1987) (misinstruction); *Rose* v. *Clark*, 478 U.S. 570 (1986) (mandatory rebuttable presumption); *Connecticut* v. *Johnson*, 460 U.S. 73 (1983) (conclusive presumption); *H* v. *Maloney*, 927 F.2d 646 (1st Cir. 1990) (conclusive presumption); *United States* v. *Dotson*, 895 F.2d 263 (6th Cir.) (failure to instruct clearly on element of the offense), *cert. denied*, 111 S. Ct. 94 (1990).

> sumption, by contrast, leaves the issue ultimately to the jury. A trial court's instructions are not limited to the presumption. A court also, as was done in this case, will charge that the defendant is presumed innocent and that the State must prove beyond a reasonable doubt each element of the crime—including [the presumed element]. . . . In the context of these instructions, the presumption provides the jury only with one means by which the State's burden of persuasion may be satisfied.

460 U.S. at 95 (Powell, J., dissenting). Accordingly, the IC's effort to equate mandatory presumptions and partial directed verdicts for harmless error purposes should be rejected.[4]

The IC does not cite a single case in which this Court or any other court has *suggested*—much less *held*—that a directed verdict on an element of an offense can be subject to harmless error analysis. In addition to the decisions of this Court cited above, every federal court of appeals to consider the question has declared that a partial directed verdict cannot be harmless.[5] The panel ma-

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[4] Contrary to the IC's suggestion, Cross-Opp. 12 n.8, North did not concede the "pending inquiry" element in his testimony at trial. *See* Cross-Pet. 8 n.7. The IC's "pertinency" argument (Cross-Opp. 12 n.8), which it never raised in the court of appeals, is meritless for the reasons that Judge Silberman stated. App. 216a-17a.

[5] *See, e.g., United States* v. *Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991); *United States* v. *Mentz*, 840 F.2d 315, 324 (6th Cir. 1988); *United States* v. *Kerley*, 838 F.2d 932, 937 (7th Cir. 1988); *United States* v. *White Horse*, 807 F.2d 1426, 1429 (8th Cir. 1986); *United States* v. *Goetz*, 746 F.2d 705, 709 (11th Cir. 1984). The IC's attempt to distinguish these cases (Cross-Opp. 12-13 & nn.10-11) misses the mark for the reasons set forth at Cross-Pet. 11-12 n.10. Moreover, the IC's contention that the *Dunkel* court "did not—and on the record before it, had no occasion to—address the question whether other findings by the jury (or concessions by the defendant at trial) might establish harmlessness," Cross-Opp. 12, begs the question presented here. If (as *Dunkel* and other courts have repeatedly held and as North contends) a directed verdict on an ele-

jority's decision conflicts directly with these decisions. If this Court grants the IC's petition for a writ of certiorari over North's opposition, it should grant the cross-petition as well.[6]

II. SECTION 1505

The IC's effort (Cross-Opp. 14-17) to distinguish *Cheek* v. *United States*, 111 S. Ct. 604 (1991), and *Liparota* v. *United States*, 471 U.S. 419 (1985), largely ignores the principle of fair notice that underlies those cases. In *Cheek* and *Liparota*, this Court construed criminal statutes to require knowledge of illegality to ensure that defendants would have notice that their conduct was unlawful. *See Cheek*, 111 S. Ct. at 609; *Liparota*, 471 U.S. at 426-27. Because 18 U.S.C. § 1505—like the statutes at issue in *Cheek* and *Liparota*—embraces a range of apparently innocent conduct, it should be construed to require proof of knowledge of wrongfulness or illegality.

The IC denies obliquely—and incorrectly—that § 1505 embraces innocent conduct. In a parenthetical buried in a long footnote, the IC quotes *Reeves* for the proposition that 18 U.S.C. § 1503 "covers only actions related to pending judicial proceedings, thus providing adequate no-

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ment of an offense is not subject to harmless error inquiry, then it is beside the point whether "findings by the jury" or "concessions by the defendant" might "establish harmlessness."

[6] The IC suggests that if this Court grants the IC's petition, it should hold North's cross-petition pending the decision in *Yates* v. *Evatt*, No. 89-7691 (argued Jan. 8, 1991). *See* Cross-Opp. 9, 14, 23. But the issue in *Yates* is the harmless error standard that should apply to *Sandstrom* errors, a question that divided the Court in *Carella*; *Yates* does not involve a partial directed verdict and does not present the question whether a partial directed verdict is subject to harmless error inquiry. Accordingly, if the Court grants the IC's petition over North's opposition, it should grant North's cross-petition regardless of the decision in *Yates*. But if the Court grants the IC's petition and would otherwise deny North's cross-petition, then we would request that the cross-petition be held to determine "if anything in *Yates* calls into question the correctness of the court of appeals' decision." Cross-Opp. 14.

tice to potential violators," and it adds that "in this regard, Section 1505, which reaches only actions related to pending congressional inquiries, stands on the same footing as Section 1503." Cross-Opp. 16 n.13. But the three panel judges were unanimous in their conclusion that § 1503 and § 1505 do *not* "stand[] on the same footing." The majority declared that because "very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap immediately to mind," a presumption that an endeavor to obstruct a judicial proceeding is corrupt "may well be warranted" for § 1503. But, the majority continued, "to import that legal presumption to section 1505—and thus to assert that all endeavors to influence, obstruct or impede the proceedings of congressional committees are, as a matter of law, corrupt—would undoubtedly criminalize some innocent behavior." App. 63a-64a; *see* App. 181a-82a. The majority and the dissent furnished several frequently-recurring examples of apparently lawful conduct intended to obstruct congressional committees. App. 64a, 182a.[7]

In a final attempt to distinguish the fair notice principle that underlies *Cheek* and *Liparota*, the IC asserts that "this is not, in fact, a case involving 'apparently innocent conduct.'" Cross-Opp. 17. As Judge Silberman pointed out, the IC's characterization of North's alleged conduct is simply wrong. App. 189a. But while we dis-

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[7] The IC contends that the danger that § 1505 will be applied to apparently innocent conduct is "obviated" by the jury's application of the word "corruptly" according to its "common meaning." Cross-Opp. 17. But the common meanings of "corruptly" that the IC offers (Cross-Opp. 17) bear no resemblance to the district court's instruction on the "corruptly" element—that North must have had "the bad purpose to act in the precise manner the statute was intended to prevent. That is, to obstruct or to try to obstruct an inquiry or proceeding." JA 574. As Judge Silberman observed, "[q]uite clearly, [the district court's 'corruptly'] instruction does *not* permit the jury to apply 'corruptly' according to its usual definitions, but instead instructs them that a corrupt intent means merely an intent to obstruct." App. 183a (quotation omitted) (emphasis in original).

agree with the IC's contention, the significant point is that the issue of intent is for the jury to decide with the benefit of proper instructions and on the basis of all relevant and admissible evidence—including, in North's case, the evidence of authorization that the district court precluded the jury from considering because of that court's impermissibly narrow view of intent.[8]

III. RECIPROCAL DISCLOSURE

A. The Conflict with *Wardius* v. *Oregon*

Although the IC argues—contrary to the express language of *Wardius*—that due process does not require the government to produce the evidence that it will use to *rebut* evidence that the defendant is compelled to produce, Cross-Opp. 18, it acknowledges that due process "requires the government to offer discovery of the same quantum *and nature* as that required of the defense, so as to maintain 'the balance of forces between the accused and his accuser,'" Cross-Opp. 18-19 (emphasis added) (quoting *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973)).[9] The IC contends that no constitutional error occurred requiring application of the *Chapman* "harmless beyond a reasonable doubt" standard because it satisfied the "same quantum and nature" requirement. Cross-Opp. 18-21. This contention understates North's compelled disclosure, and it exaggerates the IC's disclosure.[10]

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[8] Moreover, whether North's alleged conduct was "apparently innocent" is irrelevant for purposes of construing § 1505. A criminal statute must be construed the same way for all defendants. In construing the statutes at issue in *Cheek* and *Liparota*, for example, this Court did not inquire whether the defendants' specific conduct was apparently innocent or whether they had notice that their conduct was unlawful; indeed, the conduct was plainly illegal in both cases. *See Cheek*, 111 S. Ct. at 606-07; *Liparota*, 471 U.S. at 434 n.17.

[9] *Wardius* makes clear that "any imbalance in discovery rights . . . should work in the defendant's favor." 412 U.S. at 475 n.9.

[10] The cases on which the IC relies (Cross-Opp. 19) are inapposite. Those cases involved technical violations of Fed. R. Crim. P.

1. *North's Disclosure.*—The IC attempts to minimize the significance of North's compelled disclosure by confusing North's *testimonial* CIPA notice, which is at issue here, and North's *documentary* CIPA notices, which are not at issue. The IC recounts at length the procedural history pertaining to classified defense documents, *see* Cross-Opp. 6-7, 20-21, and it suggests that the district court's failure to order reciprocal disclosure did not violate *Wardius* because asserted defects in North's *documentary* CIPA notices reduced the significance of his disclosures. Cross-Opp. 20-21.[11] But the purported lack of

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12.1(b), which requires the government to provide a list of alibi rebuttal witnesses. Such minor infringements of the rule—unlike the district court's total denial of rebuttal evidence following North's unprecedented pretrial disclosure—do not rise to the level of constitutional violations and therefore do not require application of the *Chapman* "harmless beyond a reasonable doubt" standard. *Mauricio* v. *Duckworth*, which applies the *Chapman* test in the context of a nonreciprocal alibi provision, is on point. 840 F.2d 454, 459 (7th Cir.), *cert. denied*, 488 U.S. 869 (1988).

[11] The IC's account of the handling of classified documents does not present an accurate picture. On November 14, 1988, over constitutional objection, North submitted his second documentary CIPA notice. At the time North filed the second notice, the broad conspiracy and fraud allegations were still a part of the indictment. Despite that fact, the notice included, even by the IC's estimate, only 3500 documents comprising between 25,000 and 30,000 pages—a miniscule fraction of the 900,000 pages of classified documents that the IC produced under Fed. R. Crim. P. 16 because they were material to the preparation of the defense. Under CIPA, the next step was for the court to conduct a hearing at which the use, relevance, and admissibility of the noticed documents would be determined. *See* 18 U.S.C. App. IV § 6(a). But on December 12, 1988, *without conducting a hearing, permitting the defense to explain the relevance of the listed documents, or even asking for copies of the listed documents*, the district court struck the CIPA § 5 notice. JA 421, 433. The district court then arbitrarily limited the defense to 300 classified documents at trial and directed North to provide a list of those 300 documents to the IC on January 3, 1989. JA 443.

Even though CIPA requires the defense to notice only *classified* information, 18 U.S.C. App. IV § 5(a), the IC consistently refused defense requests that it identify the classified material in documents it produced so that the defense could know what to notice. Even

clarity in North's *documentary* notices has nothing to do with North's *testimonial* CIPA notice. The IC virtually ignores the district court's conclusion that a "substantial portion" of the testimonial notice "contain[ed] relevant and material facts and information of value to the defendant" and "contain[ed] references to many pertinent facts and circumstances which the Court believes are likely to alert Independent Counsel to aspects of issues not previously brought to his attention." Cross-App. 15a. North's 162-page testimonial notice (reprinted at JA 3393-3555) provided the IC an unprecedented, fact-by-fact pretrial roadmap to the defense.[12]

2. *The IC's Disclosure.*—Although the IC was never compelled to disclose the anticipated trial testimony of its witnesses or to furnish any reciprocal disclosure under CIPA § 6(f), the IC asserts that other materials it provided balanced North's detailed disclosure of anticipated classified defense testimony. Cross-Opp. 20-21. But even under the IC's view, *Wardius* requires the government to provide discovery of the "same quantum *and nature* as that required of the defense." Cross-Opp. 18-19 (emphasis added). Although the IC satisfied the "quantum" prong of this test, it never provided information of the same "nature" as North's 162-page recitation

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after the district court struck North's second documentary CIPA notice and limited North to 300 classified documents at trial, the court denied North's request that the 3500 documents on the second CIPA notice be submitted for classification review so that the defense could determine what, if any, portions of the documents were still classified and use them at trial with the classified material redacted. JA 454.

[12] The IC does not contend that the district court's error was harmless under the *Chapman* test. Nor could the IC make such an argument; it does not deny that it dropped two weak charges, shifted its theories of prosecution, withdrew documents and witnesses, and shaped its opening statement in response to the pretrial disclosures that North was compelled to make in his 162-page testimonial CIPA notice. *See* Cross-Opp. 18-22; Cross-Pet. 24-25.

of expected classified defense testimony.[13] Neither the mass of documents that the IC produced nor the other materials to which the IC refers even began to balance the focused, fact-by-fact exposition of the defense provided in the CIPA notice. The compelled, nonreciprocal disclosure violated North's rights under *Wardius*, and the panel majority should have applied the *Chapman* harmless error standard.

B. The Conflict with *Kotteakos* v. *United States*

Contrary to the IC's representation, North does *not* "acknowledge[] . . . that the defendant must establish prejudice when the [nonconstitutional] error did not affect his substantial rights." Cross-Opp. 22 (citing Cross-Pet. 27).[14] At the page of the cross-petition cited by the IC, North paraphrased this Court's words in *Kotteakos* v. *United States*, 328 U.S. 750 (1946). The crucial language from *Kotteakos* upon which North relies—ignored by the IC—recognizes two categories of nonconstitutional errors: (1) those that are merely "technical," as to which the party seeking to overturn a judgment has the burden of proving harm, and (2) those the "natural effect [of which] is to prejudice a litigant's substantial rights," as to which the party seeking to sustain the judgment has the burden of proving absence

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[13] The IC successfully resisted making such a disclosure in connection with the district court's truncated pretrial *Kastigar* proceedings. The IC argued that it should not be compelled to meet its "heavy burden" under *Kastigar* before trial because "a pretrial hearing would force the government to take the expansive view of potential trial evidence," and would "compel the prosecution to preview for the defense all of the evidence to be used at trial." Memorandum of the Government in Response to Defendants' Motion to Dismiss Indictment and Suggested Steps for Considering *Kastigar* Issues, at 7, 9 (filed Apr. 8, 1988).

[14] The IC's paraphrase of North's position is incoherent. If a nonconstitutional error does not affect the defendant's "substantial rights," then it is by definition not "prejudi[cial]." Accordingly, it makes no sense to say that the defendant must *establish* prejudice when the error "did not affect his substantial rights."

of harm. *Id.* at 760 (quotation omitted). The "natural effect" of North's compelled, nonreciprocal disclosure unquestionably was to "prejudice [his] substantial rights." Accordingly, the court of appeals should have placed the burden of proving harmlessness on the IC.[15]

CONCLUSION

If the Court grants the IC's petition for a writ of certiorari over North's opposition, then the cross-petition for a writ of certiorari should be granted as well.

Respectfully submitted,

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[15] The burden-of-proof issue was neither discussed nor decided in the cases that the IC cites at Cross-Opp. 21-22.